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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED

Whether the management-appointed trustee of a jointly administered multi-employer trust fund established under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B).

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* The other parties to this case are the United Mine Workers of America, Local No. 1854 and the United Mine Workers of America. The Union has also filed a petition for a writ of certiorari to review the judgment in this case. See *United Mine Workers of America, Local No. 1854* v. *NLRB*, No. 80-289 (filed Aug. 26, 1980). Question 1 of that petition presents the same question that is presented here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	1
Reasons for granting the petition	8
Conclusion	18
Appendix A	1a
Appendix B	33a
Appendix C	41a
Appendix D	43a
Appendix E	228a

TABLE OF AUTHORITIES

Cases:

Allied Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 15

American Broadcasting Companies v. *Writers Guild of America, West, Inc.*, 437 U.S. 411 .. 14, 17

Arroyo v. *United States*, 359 U.S. 419 ..... 2, 11

Associated General Contractors of Essex County, Inc. v. *Laborers International Union*, 559 F.2d 222 7

Blankenship v. *Boyle*, 329 F. Supp. 1089, aff'd mem., 511 F.2d 447 ..... 2, 3, 10

Blassie v. *Kroger Co.*, 345 F.2d 58 16

Cutaiar v. *Marshall*, 590 F.2d 523 12

Denver Metropolitan Ass'n of Plumbing Contractors v. *Journeyman Plumbers Local No. 3*, 586 F.2d 1367 ..... 11, 16

Florida Power & Light Co. v. *IBEW, Local 641*, 417 U.S. 790 14

Ford Motor Co. v. *NLRB*, 441 U.S. 488 15

Gooding v. *United States*, 416 U.S. 430 9

PREVIOUS PAGE WAS BLANK

Cases—Continued: Page

Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 9
Lamb v. *Carey*, 498 F.2d 789 ..... 10, 15
Miniard v. *Lewis*, 387 F.2d 864 13
Morgan v. *Laborers Pension Trust Fund*, 433 F. Supp. 518 14
Nachman Corp. v. *Pension Benefit Guaranty Corp.*, No. 78-1557 (May 12, 1980) 3
NLRB v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16 13
NLRB v. *Insurance Agents*, 361 U.S. 477 17
Owen v. *City of Independence*, No. 78-1779 (Apr. 16, 1980) 9
Rehmar v. *Smith*, 555 F.2d 1362 15
Sheet Metal Workers' International Association, 234 N.L.R.B. 1238, petition for review pending *sub nom. Central Florida Sheetmetal Contractors Ass'n* v. *NLRB*, No. 79-2396 ..... 6, 16
Toensing v. *Brown*, 528 F.2d 69 ..... 13, 15
United Marine Division, ILA v. *Essex Transportation Co.*, 216 F.2d 410 13
United States v. *Ryan*, 350 U.S. 299 ..... 2, 15
Walsh v. *Schlecht*, 429 U.S. 401 2

Statutes:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (ERISA), 29 U.S.C. 1001 *et seq.* 1, 3, 8

Section 404(a), 29 U.S.C. 1104(a) 3
Section 404(a)(1), 29 U.S.C. 1104(a)(1) ... 3, 11
Section 404(a)(1)(E), 29 U.S.C. 1104(a)(1)(E) 3
Section 405, 29 U.S.C. 1105 11
Section 405(a), 29 U.S.C. 1105(a) 11

Statutes—Continued: Page

Section 405(a)(3), 29 U.S.C. 1105(a)(3) ... 17
Section 405(b)(1)(A), 29 U.S.C. 1105(b)(1)(A) 17, 241a
Section 406(b)(2), 29 U.S.C. 1106(b)(2) ... 3, 11
Section 407, 29 U.S.C. 1107 3
Section 409, 29 U.S.C. 1109 ..... 11, 235a, 255a
Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 141 *et seq.* 1
Section 302, 29 U.S.C. 186 ..... 1, 15, 231a
Section 302(c)(5), 29 U.S.C. 186(c)(5) 1, 8, 9, 10, 11, 17, 232a-233a
Section 302(c)(5)(A), 29 U.S.C. 186(c)(5)(A) 2, 232a-233a
Section 302(c)(5)(B), 29 U.S.C. 186(c)(5)(B) 2, 4, 9, 233a
Section 302(c)(5)(C), 29 U.S.C. 186(c)(5)(C) 2, 233a
Multiemployer and Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 (Sept. 30, 1980) 12
National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* 1
Section 8(a)(5), 29 U.S.C. 158(a)(5) 17
Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B) ..4, 5, 7, 8, 9, 14, 17
Section 8(b)(3), 29 U.S.C. 158(b)(3) 4, 5, 7, 17, 228a
Section 8(b)(4)(A), 29 U.S.C. 158(b)(4)(A) . 4, 5
Section 8(d), 29 U.S.C. 158(d) 17, 228a
Section 8(e), 29 U.S.C. 158(e) 5, 228a

Miscellaneous:

ABA *Labor Relations Law* (1977)..... 16
Bogert, *Trusts and Trustees* (2d rev. ed. 1978) 9

Miscellaneous—Continued: Page

Department of Labor, *Pension and Welfare Benefit Programs: Study of Multi-Employer Plans* (1979) 16
H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 11
H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) 12
H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 10, 14
H. R. Rep. No. 96-869 (Pt. 1), 96th Cong., 2d Sess. (1980) 16
Restatement (Second) of Trusts (1959) 9
Scott, *The Fiduciary Principle*, 37 Calif. L. Rev. 539 (1949) 9
II Scott, *Trusts* (2d ed. 1956) 9
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) .. 14
93 Cong. Rec. (1947):
p. 3623 11
p. 3837 14
pp. 4745-4747 11
pp. 4751-4753 ..... 10, 11
126 Cong. Rec:
H7902 (daily ed. Aug. 26, 1980) 13
S10104 (daily ed. July 29, 1980) 12

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–32a) is reported at 614 F.2d 872. The decision and order of the National Labor Relations Board (App. D, *infra*, 43a–227a) are reported at 238 N.L.R.B. No. 214.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 33a–40a) was entered on April 3, 1980. A petition for rehearing was denied on May 29, 1980 (App. C, *infra*, 41a–42a). On September 18, 1980, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*; the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, are set forth at App. E, *infra*, 228a–255a.

STATEMENT

1. a. In 1947, Congress first began to regulate pension and other welfare funds. Although Section 302 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186, generally prohibits employer payments to any representative of his employees, Section 302(c)(5), 29 U.S.C. 186(c)(5), permits employer contributions to a welfare trust fund provided that the fund satisfies various requirements. For example, qualifying welfare funds must

be in the form of a trust. See 29 U.S.C. 186(c)(5)(A). The fund can provide only certain types of benefits for employees and their families and dependents,[1] and the basis for such payments must be specified in a written, detailed agreement with the employer. See 29 U.S.C. 186(c)(5)(A) and (B). The fund must also be audited annually, and the results of the audit must be made available to all interested persons. 29 U.S.C. 186(c)(5). Furthermore, pension or annuity funds are to be kept in a trust separate from other welfare funds. 29 U.S.C. 186(c)(5)(C).

In addition to these requirements, Section 302(c)(5)(B) directs that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon * * *." 29 U.S.C. 186(c)(5)(B).[2] This provision reflects congressional concern "with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425–426 (1959). See also *Walsh* v. *Schlecht*, 429 U.S. 401, 410–411 (1977); *United States* v. *Ryan*, 350 U.S. 299, 304–307 (1956). By requiring equal representation with regard to the trustees, Congress sought "to isolate such welfare funds from labor-management politics" and to ensure that the funds are operated solely for the benefit of the employees, rather than as "'a war chest * * * for the union.'" *Blankenship* v.

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[1] The trust funds are limited to paying "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. 186(c)(5)(A).

[2] If, in the absence of a neutral trustee, the employee and employer trustees deadlock, Section 302(c)(5)(B) further provides that the trustees may select a neutral arbiter or "in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office * * *." 29 U.S.C. 186(c)(5)(B).

Boyle, 329 F. Supp. 1089, 1094–1095 (D.D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975).

b. In 1974, Congress enacted a comprehensive scheme of pension and welfare fund regulation. The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93–406, 88 Stat. 829, codified at 29 U.S.C. 1001 *et seq.*, sets forth detailed requirements concerning the creation, administration, and termination of pension and welfare funds. See generally *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, No. 78–1557 (May 12, 1980). In particular, Part 4 of Title I of ERISA imposes various duties and restrictions on the trustees of such pension funds, and limits or prohibits certain types of transactions.

Thus, Section 404(a) of ERISA, 29 U.S.C. 1104(a), establishes a prudent man standard of care for all trust fiduciaries, and requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). Similarly, Section 406(b)(2) of ERISA prohibits a trustee from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Sections 406(a)(1)(E) and 407 limit the amount and kinds of employer property and securities that a trust may acquire. See 29 U.S.C. 1106(a)(1)(E) and 1107.

2. Amax Coal Company, a Division of Amax, Inc., is in the business of mining coal, primarily in deep shaft bituminous mines located in the midwestern United States. It bargains with the United Mine Workers of America ("the Union") for its midwestern mines as a member of the Bituminous Coal Operators Association ("BCOA"), a nationwide multi-employer group. In 1972, Amax opened the Belle Ayr Mine in Wyoming, its first sub-bituminous surface mine. Although that mine, like most western surface mines, did not become a member of BCOA, Amax and the Union agreed to a contract regarding the Belle Ayr Mine, which was patterned after the

BCOA national contract (App. A, *infra*, 3a; App. D, *infra*, 76a–79a).

In January 1975, after the western surface mine contracts, including the Belle Ayr Mine Contract, had expired,[3] the Union struck the Belle Ayr Mine and other employers. Amax resisted the Union's attempts to compel establishment of a multi-employer bargaining group,[4] and in February 1975, the Union, after learning that the Board's Regional Director was preparing to issue a complaint, began separate negotiations with Amax with regard to the Belle Ayr Mine. These negotiations were unproductive, however, and, by mid-March 1975, the parties had reached an impasse on several points. In particular, the Union insisted that Amax continue to make its pension and welfare contributions to the Union's existing national pension and welfare trust funds.[5] On March 17, 1975, Amax resumed operation of the Belle Ayr Mine under the terms of its last contract offer. Although sporadic negotiations occurred during the next year, no agreement was ever reached (App. A, *infra*, 4a–7a; App. D, *infra*, 46a–52a, 80a–125a).

3. The Board unanimously concluded that the Union did not violate Sections 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B) and (b)(3), by bargaining to impasse and striking in sup-

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[3] These contracts, as well as the BCOA national contract, were originally scheduled to expire on November 12, 1974, but had been extended for two months (App. A, *infra*, 3a–4a; App. D, *infra*, 46a–50a).

[4] The Board found that, insofar as the strike was designed to compel Amax to bargain through a multi-employer group, the Union had violated Sections 8(b)(1)(B) and 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) and (b)(4)(A). See App. D, *infra*, 45a–56a. The court of appeals affirmed this finding (App. A, *infra*, 7a–12a), which is not before this Court.

[5] These funds had three trustees previously appointed in accordance with Section 302(c)(5)(B) of the LMRA: one selected by management, one selected by the Union, and one neutral trustee. Amax through its membership in the BCOA had participated in the selection of the management-appointed trustee (App. D, *infra*, 57a, 135a–137a & n.48).

port of its proposal that Amax continue to contribute to the Union's existing national pension and welfare trust funds with regard to the Belle Ayr employees.[6] The Board observed that proposals concerning employer contributions to employee benefits funds are unquestionably mandatory subjects of bargaining (App. D, *infra*, 58a). The Board rejected Amax's claim that, notwithstanding the otherwise mandatory nature of the Union's trust fund proposal, the Union's insistence on an existing trust fund was unlawful because it coerced Amax in its selection of a collective-bargaining representative, that is, the preselected management-appointed trustee of the Union's existing multi-employer trust fund. Affirming in relevant part the decision of the administrative law judge, the Board held that "the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act" (App. D, *infra*, 57a).

The Board explained that the trustees of a jointly administered, multi-employer trust fund are not collective-bargaining representatives because such trustees "are solely fiduciaries, owing undivided loyalty to the benefici-

[6] The Board also found that the Union did not violate Sections 8(b)(3) and 8(e), 29 U.S.C. 158(b)(3) and (e), of the NLRA by insisting to impasse on a number of other contract clauses, including enabling, coal lands, and successorship clauses (App. D, *infra*, 59a–63a, 171a–176a). As indicated above, the Board further held that the Union violated Section 8(b)(1)(B) and 8(b)(4)(A) of the NLRA, 29 U.S.C. 158(b)(1)(B) and (b)(4)(A), by attempting to force Amax to join involuntarily a multi-employer bargaining unit. See note 4, *supra*. In addition, the Board found that the Union violated Sections 8(b)(3) and 8(e) by insisting to impasse upon a leasing-licensing out clause that would have required Amax to insist that all licensees or lessees of its coal lands adhere to all of the terms of the collective bargaining agreement between Amax and the Union (App. D, *infra*, 65a, 176a–183a).

The court of appeals reversed the Board's conclusion with regard to the enabling and coal land clauses (App. A, *infra*, 16a–19a), and affirmed as to the successorship and leasing-licensing out clauses, the multi-employer bargaining unit question and other issues (*id.* at 7a–12a, 14a–16a, 19a–28a). Questions 2 and 3 of the petition for a writ of certiorari in No. 80–289 (see note *, *supra*) seek review of the court of appeals' decision regarding the enabling and coal lands clauses and the leasing and licensing out clause, respectively.

aries of such a plan" (App. D, *infra*, 58a). This distinction had been fully explicated in the Board's prior decision in *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978), petition for review pending *sub nom. Central Florida Sheetmetal Contractors Ass'n* v. *NLRB*, No. 79-2396 (5th Cir.) (cited with approval at App. D, *infra*, 58a-59a):

> [W]e conclude that the * * * trustees are not collective-bargaining representatives within the meaning of Section 8(b)(1)(B) of the [NLRA]. In arriving at this conclusion, we note first that, by insulating an employer from union interference in the selection process, Section 8(b)(1)(B) ensures that an employer may bargain through a freely chosen representative that is completely faithful to his interests. Indeed, an individual or entity that possesses duly delegated authority to act as a bargaining agent must, in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of his appointing party * * *. [H]owever, the trustees of a joint trust fund * * * are required to act solely in the interests of the beneficiaries of the trust fund. The fiduciary obligations imposed on the trustees are of overriding importance, and, although they should, of course, carefully consider all recommendations submitted by the parties who have appointed them, the trustees are bound to exercise their independent judgment when making decisions with respect to the administration of the trust fund. We therefore conclude, in agreement with the weight of judicial precedent on this issue, that there is nothing in either the statute or its underlying legislative history to support the contention that Congress intended that trust funds established pursuant to Section 302(c)(5) [of the LMRA] are to deviate from the established principle of trust law that a trustee must always act in a manner that operates solely to the advantage of the beneficiaries.

234 N.L.R.B. at 1248 (footnote omitted). Since the trustees of a fund established under Section 302(c)(5) of the LMRA are not collective bargaining representatives, the Union's demand that Amax contribute to the existing trust

funds did not restrain or coerce Amax in violation of Section 8(b)(1)(B), even though the management trustee of the fund had previously been selected.[7] Accordingly, the Board dismissed this portion of the complaint (App. D, *infra*, 59a).

4. A two-judge panel of the court of appeals reversed the Board's determination regarding the status of management-appointed trustees of a joint trust fund and held that such trustees are collective bargaining representatives covered by Section 8(b)(1)(B) of the NLRA.[8] Relying on its prior decision in *Associated General Contractors of Essex County, Inc.* v. *Laborers International Union*, 559 F.2d 222, 227–228 (3d Cir. 1977), the court stated (App. A, *infra*, 13a):

> Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them.

The court of appeals accordingly concluded that the Union had coerced Amax in its selection of a collective bargaining representative and unlawfully refused to bargain insofar as the Union had insisted on its proposal that Amax continue to contribute to the Union's existing national trust funds whose trustees had previously been selected (*id.* at 14a). Because, in the court's view, the Union's behavior thus violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA, the court ordered the Union to cease and desist from "insisting to the point of impasse that Amax * * * participate

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[7] Likewise, the Union's bargaining to impasse and striking over the welfare and pension fund issue did not run afoul of its obligation to bargain under Section 8(b)(3).

[8] Although Judge Gibbons heard oral argument in this case in the court of appeals, he did not participate in the decision. See App. A, *infra*, 1a n.*.

in the [Union's] multi-employer pension and welfare funds" (App. B, *infra*, 36a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the role and duties of a trustee of a jointly-administered, multi-employer trust fund established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186(c)(5). The court of appeals has held that a management-appointed trustee of such an employee trust fund owes his loyalty to management as well as to the beneficiaries of the trust, and is therefore a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B). As a result, a union cannot bargain to impasse and strike about employer contributions to existing multi-employer trust funds, even though the use and continuity of such trust funds are critical terms and conditions of employment. Moreover, the court of appeals' decision, if left standing, would compel the Board for the first time to consider a trustee's administration of pension and welfare funds as collective bargaining under the NLRA.

This virtually unprecedented decision of the court of appeals is erroneous in two respects. First, the language, purpose, and legislative history of both the LMRA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, make clear that the trustee of an employee pension or welfare fund is not to be involved in labor-management competition, but rather owes a fiduciary duty exclusively to the beneficiaries of the trust. Accordingly, the lower federal courts have generally rejected the conclusion of the court below that such trustees represent the party that appoints them as well as the trust beneficiaries. Moreover, even assuming that the court of appeals has correctly concluded that such trustees have a dual loyalty, it does not follow that a trustee is therefore a collective bargaining representative within the purview of Section 8(b)(1)(B). To the contrary, this Court

has repeatedly recognized that Section 8(b)(1)(B) has a limited scope and that a trustee is not ordinarily a collective bargaining representative. Because the erroneous decision of the court below will have an immediate and substantial impact on collective bargaining involving millions of employees and on the administration of billions of dollars in trust fund assets, review by this Court is warranted.

1. The court of appeals held that a management-appointed trustee of an employee pension or welfare fund is a collective bargaining representative under the labor laws because Section 302(c)(5) of the LMRA requires a trustee to represent the party that appointed him (*i.e.*, the employer or the union) as well as the beneficiaries of the trust. At the outset, we note that the principle of dual loyalty created by the court of appeals is at odds with well settled fiduciary law. The common law imposes a duty on a trustee to "display throughout the administration of the trust complete loyalty to the interests of the beneficiary and [to] exclude all selfish interests and all consideration of the interests of third persons." Bogert, *Trusts and Trustees* § 543 (2d rev. ed. 1978). See *Restatement (Second) of Trusts* § 170(1) (1959); II Scott, *Trusts* § 170 (2d ed. 1956); Scott, *The Fiduciary Principle*, 37 Calif. L. Rev. 539 (1949). In light of this well-established principle, the court of appeals should not have concluded that the LMRA fundamentally alters the common law (now codified in ERISA) regarding trustees unless Congress has unequivocally evidenced its intent to do so. See, *e.g.*, *Owen* v. *City of Independence*, No. 78-1779 (Apr. 16, 1980), slip op. 14-15; *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Here, as we now demonstrate, neither the language nor the legislative history of the LMRA supports the decision below, and various provisions of ERISA expressly reject the principle of dual loyalty.

a. Section 302(c)(5)(B) requires that "employees and employers [be] equally represented in the administration of such [pension and welfare] fund[s]." 29 U.S.C. 186(c)(5)(B). That language merely provides that manage-

ment and the union are entitled to appoint an equal number of trustees. Nothing in Section 302(c)(5) further indicates that Congress thereby abrogated the common law duty of exclusive loyalty to the trust beneficiaries by directing a trustee once appointed to continue representing the party that appointed him. To the contrary, neither an employer nor a union can remove "its" trustee because he fails to represent management or union views in administering the trust. See *Lamb* v. *Carey*, 498 F.2d 789, 793–794 (D.C. Cir. 1974). Moreover, Section 302(c)(5) as a whole is "designed expressly to isolate such welfare funds from labor-management politics * * * [and] designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the duty of undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1094–1095 (D.D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975).[9]

Similarly, the legislative history shows that Section 302(c)(5) was enacted to ensure that employee trust funds are operated solely for the benefit of the employees and to remove the administration of such funds from the arena of labor-management competition. As Senator Ball explained, "all we seek to do by the amendment [Section 302(c)(5)] is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947). Likewise, Senator Taft stated that the purpose of Section 302(c)(5) was to prevent the fund from becoming "a war chest * * * for the union," "to require that the fund shall be established in definite, detailed form, in the form of a trust fund," and "to prevent the abuse of welfare funds." *id.* at 4746–4747. See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 29, 78–79 (1947); H.R. Conf.

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[9] For example, Section 302(c)(5) requires that the fund be established in the form of a written, formal trust for the exclusive benefit of the employees and their dependents, and that the decisive vote be cast by neutral trustees. See pages 1-2, *supra*.

Rep. No. 510, 80th Cong., 1st Sess. 66–67 (1947); 93 Cong. Rec. 3623 (1947) (remarks of Rep. Case); *Arroyo* v. *United States*, 359 U.S. 419, 425–426 (1957). Nowhere, however, did Congress express the view that Section 302(c)(5) was also intended to impose an additional duty of representation on fund trustees in derogation of their common law duty of loyalty to the trust beneficiaries.[10]

b. In enacting ERISA in 1974, Congress reaffirmed that fund trustees are to be held to strict fiduciary standards inconsistent with the standard of dual loyalty adopted by the court of appeals. See *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, 586 F.2d 1367, 1373–1375 (10th Cir. 1978). Thus, Section 404(a)(1) of ERISA requires a trustee to "discharge his duties * * * *solely* in the interest of the participants and beneficiaries and * * * for the *exclusive* purpose of * * * providing benefits to participants and their beneficiaries * * *." 29 U.S.C. 1104(a)(1) (emphasis supplied). In addition, Section 406(b)(2) provides that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Section 405 of ERISA imposes an affirmative duty on each trustee to prevent every other trustee of the same fund from breaching their fiduciary duties, including their duty to act solely on behalf of the trust beneficiaries. See 29 U.S.C. 1105(a).[11]

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[10] Indeed, the primary concern underlying Section 302(c)(5) is the prevention of union manipulation or exploitation of employee trust funds. See 93 Cong. Rec. 4745–4747, 4751–4753 (1974); *Arroyo* v. *United States*, *supra*. By requiring that union-appointed trustees continue to represent union interests, the rationale of the decision below would frustrate Congress' principal purpose.

[11] We also note that, although the trustees are liable for their breach of duty (29 U.S.C. 1109), "[t]he appointing authority [*i.e.*, the employers or the union] is not responsible for the acts of fiduciaries, unless upon some negligent selection theory." *Denver Metropolitan Ass'n. of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, *supra*, 586 F.2d at 1375. Accordingly, a trustee is not an agent or representative of the appointing party.

It is thus apparent that the court of appeals erroneously concluded that a management-appointed trustee represents both management and the trust beneficiaries. Indeed, the House Conference Report accompanying ERISA makes clear that Congress intended to prohibit a trustee "from being put into a position where he has dual loyalties and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 309 (1974). See also *Cutaiar* v. *Marshall*, 590 F.2d 523, 529-530 (3d Cir. 1979). Furthermore, in amending ERISA in 1980 to take into account the special and important problems of multi-employer pension funds,[12] the sponsors of the legislation in both Houses of Congress expressly disapproved the decision of the court of appeals in this case.[13]

c. The decision of the court of appeals also conflicts in principle with the decisions of other courts of appeals. Consistent with the position of the Board and of the Secre-

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[12] The Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 (Sept. 30, 1980).

[13] The following colloquy occurred during the Senate debates (126 Cong. Rec. S10104 (daily ed. July 29, 1980):

> "MR. RANDOLPH. * * * If the chairman of the committee is agreeable, I wonder if I might address him to clarify a new point which concerns me. Although this bill has added new and additional responsibilities of plan trustees, particularly under the reorgnization provisions of the bill, is it not correct that this legislation reaffirms the present law, that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? My concern is based partly on a recent Court of Appeals decision, which I believe will be overturned on appeal, that apparently suggests that the trustee[s] have some obligations to the parties who appoint them. I do not believe that we in the Congress have ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers."
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> * * * * *
>
> "MR. WILLIAMS. I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees must be made with the sole

tary of Labor,[14] several courts of appeals have concluded that the trustees of Section 302(c)(5) employee funds owe a duty of exclusive loyalty to the beneficiaries of the trust and "do not act as representatives of either the employers or the union." *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967). For example, in *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20–21 (8th Cir. 1978), the court of appeals determined that ERISA imposes a duty of loyalty on pension fund trustees, and that insofar as the conduct of the union-appointed trustee in that case "support[ed] the interests of a third party (the Union) [,it] was beyond the scope of his authority as a trustee." *Id.* at 21. See also *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, *supra*, 586 F.2d at 1373–1375 (each employer may not select a trustee for a multi-employer pension fund); *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975) (trustees must exercise independent judgment and are not bound by recommendation of collective bargaining parties); *United Marine Division, ILA* v. *Essex Transportation Co.*, 216 F.2d 410, 412 (3d Cir. 1954) (trustees do not

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interest of the plan's beneficiaries in mind. That was, that is, and that will be."

Likewise, Representative Thompson stated (126 Cong. Rec. H7902 (daily ed. Aug. 26, 1980)):

> "Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect congressional intent.

[14] The Secretary of Labor filed an amicus curiae brief with the Board in this case and in *Sheet Metal Workers'*, *supra*, expressing the view that "the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective-bargaining representative." 234 N.L.R.B. at 1246. The Secretary also supports this petition for a writ of certiorari.

act "as representatives of either union or employers"); *Morgan* v. *Laborers Pension Trust Fund*, 433 F. Supp. 518, 530 (N.D. Cal. 1977); *Blankenship* v. *Boyle*, *supra*. Particularly in light of the serious and important ramifications of the court of appeals' decision described below, this divergence of views among the lower federal courts warrants this Court's review.

2. Even assuming that trustees of an employee trust fund owe some form of duty to the party that appoints them, the court of appeals erroneously concluded that a trustee is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the NLRA. That statute prohibits a union from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. 158(b)(1)(B). As this Court concluded in *Florida Power & Light Co.* v. *IBEW, Local 641*, 417 U.S. 790, 803 (1974), "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." In other words, Section 8(b)(1)(B) is a narrow provision designed solely to ensure the undivided loyalty of an employer's freely chosen representatives while engaged in collective bargaining and grievance adjustment. See 417 U.S. at 803–805; *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 422–423, 429–431, 435–436 (1978); S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 16–17 (1947); 93 Cong. Rec. 3837 (1947) (remarks of Sen. Taft).

Because, even in the court of appeals' view, a trustee is primarily obligated to represent the trust beneficiaries and therefore cannot be completely loyal to the employer's interests or faithful to his orders, a trustee cannot be a collective bargaining representative covered by Section 8(b)(1)(B). Furthermore, a trustee administers the relationship between the beneficiaries, who may or may not

be employees, and the trust fund, and is not involved in the mainstream of day-to-day labor-management relations. And whereas the employer both directs and remunerates traditional collective bargaining representatives, trustees are paid by the trust and, at a minimum, are not bound by the requests of their appointing party. See *Toensing* v. *Brown*, *supra*, 528 F.2d at 72. In fact, a management-appointed trustee can ignore the recommendations of management and is not subject to removal. See *Lamb* v. *Carey*, *supra*, 498 F.2d at 793–794. In sum, a trustee is simply not a collective bargaining representative. See, *e.g.*, *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976); *Toensing* v. *Brown*, *supra*; *Miniard* v. *Lewis*, *supra*.

Indeed, on two occasions this Court has expressly recognized the distinction between collective bargaining representatives and fund trustees. In *United States* v. *Ryan*, 350 U.S. 299 (1956), the Court held that the word "'representative'" in Section 302 of the LMRA is not limited solely to "exclusive [*i.e.*, collective] bargaining representative." The Court pointed out that if Section 302 covered only collective bargaining representatives, "[p]ayments made * * * to other individuals as trustees [of employee welfare funds] would apparently be excluded from § 302." 350 U.S. at 305. More recently, in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971), the Court observed that "the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent."

3. The issue presented by this case is important. The erroneous decision of the court of appeals will have a substantial adverse impact upon collective bargaining, trust fund administration, and the administration of the NLRA. Although a union may bargain to impasse and strike over the price of a cup of coffee in an in-plant cafeteria (*Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979)), it may not, under the court of appeals' ruling, insist upon employer contributions to an existing multi-employer trust fund. But such funds, which cover more than 8.8 million employ-

ees and pensioners and total more than $22.7 billion in assets,[15] may operate in a more efficient and dependable manner than a single-employer plan, and are often a critical term or condition of employment. See *Sheet Metal Workers'*, *supra*, 234 N.L.R.B. at 1244. For example, in industries like the construction trade in which employees do not work continuously for one employer, a multi-employer fund will often be the only means of ensuring that an employee can continuously accumulate retirement credits and enjoy continuity of benefits. See, *e.g.*, *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Plumbers Local No. 3*, *supra*, 586 F.2d at 1371, 1375; H.R. Rep. No. 96-869 (Pt. 1), 96th Cong., 2d Sess. 53 (1980) (a multi-employer plan "enables a participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on service with any one employer, to receive a pension").

Notwithstanding the obviously important nature of the pension fund issue to employees, the court of appeals has concluded that contributions to an existing multi-employer fund are not a mandatory subject of bargaining and that therefore each employer wields a non-bargainable veto over his employees' efforts to join a multi-employer plan. The conclusion that each employer can select his own representative trustee and demand a single-employer plan would, however, jeopardize the creation of new multi-employer plans and the continued existence of current plans, thereby exposing employees to the higher costs, the greater risks, and the lack of portability associated with individual employer plans. See ABA *Labor Relations Law* 213-214 (1977); *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Plumbers Local No. 3*, *supra*, 586 F.2d at 1373-1375. See also *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965) (contributing employer does not necessarily

[15] See Department of Labor, *Pension and Welfare Benefit Programs: Study of Multi-Employer Plans* I-2, I-10, IV-5 (1979) (based on 1975 figures). The number and size of multi-employer funds is growing. See *id.* at I-15 (predicting more than 16 million covered employees by 2000); H.R. Rep. No. 96-869 (Pt. 1), 96th Cong., 2d Sess. 51-57 (1980).

have the right to participate in the selection of the employer trustees).[16]

Finally, the holding of the court of appeals that trust fund administration constitutes "collective bargaining" within the meaning of the NLRA would improperly thrust the Board "'into a new area of regulation which Congress [has] not committed to it.'" *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 497, quoting from *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499 (1960). For the first time, the actions of trustees in administering a fund would be subject to the duty of good faith bargaining set forth in Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA, 29 U.S.C. 158(a)(5), (b)(3), and (d). Consequently, the duty owed to the trust beneficiaries might be diluted because a trustee would be regulated by the Board, the Secretary of Labor, and the courts, and would face the different and possibly conflicting duties imposed by Section 8 of the NLRA, Section 302(c)(5) of the LMRA, and ERISA.[17]

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[16] In this case, 1786 of the 2009 employers who contribute to the UMWA funds at issue are independent signatories and not members of BCOA, which selected the employer trustee. The court of appeals' decision would thus preclude the UMWA from bargaining to impasse and striking over the continued fund participation of more than 85% of the contributing employers.

[17] For example, Sections 405(a)(3) and 405(b)(1)(A) of ERISA require a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the employee beneficiaries. On the other hand, it is a violation of Section 8(b)(1)(B) of the NLRA for a union representative to interfere with the employer collective bargaining agent's performance of his duties in accordance with the employer's instructions. *American Broadcasting Companies* v. *Writers Guild*, *supra*, 437 U.S. at 436. Thus, if trust fund administration is "collective bargaining" as the court of appeals concluded, a trustee might well be found to have committed an unfair labor practice merely by fulfilling his obligations under ERISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2310

AMAX COAL COMPANY, a Division of AMAX, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA, *Intervenors*

No. 78-2489

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 and UNITED MINE WORKERS OF AMERICA, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

AMAX COAL COMPANY, a Division of AMAX, INC.,
Intervenor

PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD and CROSS-APPLICATION FOR ENFORCEMENT

Argued October 18, 1979

Before GIBBONS,* HIGGINBOTHAM, *Circuit Judges* and ZIEGLER, *District Judge***

(Filed February 1, 1980)

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*Judge Gibbons did not participate in the decision of the Court, although he heard oral argument.

**Honorable Donald E. Ziegler of the United States District Court for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*

This case is before the Court upon the petitions of Amax Coal Company, a division of Amax, Inc., (Amax or the Company) and the United Mine Workers of America (the Union or UMWA) to review an order of the National Labor Relations Board (the Board). The Board found that the Union violated the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, (the Act) by threatening to strike and by striking to coerce Amax into bargaining through a multi-employer group; by refusing to meet and bargain separately with Amax before February 3, 1975; by striking without first notifying the Federal Mediation and Conciliation Service about its dispute with Amax; by bargaining to impasse and striking in support of its demands that the Company agree to six contract clauses in violation of Section 8(e) of the Act. 29 U.S.C. §158(e). The Board also found that the Union did not violate the Act by bargaining to impasse upon several other clauses that the General Counsel had alleged to be nonmandatory or unlawful, and that neither party had engaged in overall bad faith bargaining. Finally, the Board declined to decide whether the Union had violated the Act by insisting upon several other contract clause proposals because the violations had not been alleged in the complaint. The Company has intervened in the proceeding initiated by the Union; the Union has intervened in the proceeding initiated by the Company; and the Board has filed a cross-application for enforce-

ment of its order. The cases have been consolidated for the purposes of briefing and argument.

Because we hold that the management trustee of this Union's pension and welfare fund is a collective bargaining representative within the meaning of Section 8(b)(1)(B), we conclude that the Union violated the Act by striking to obtain Amax's participation in the fund whose management trustee is not selected by Amax. We also conclude that the Union bargained to impasse on two clauses that were not mandatory subjects of bargaining. Accordingly, the Company's petition for review will be granted and the Board's cross-application for enforcement of its order will be denied insofar as they relate to the trust fund representatives and to the "enabling" and "coal lands" clauses. The Union's petition for review will be denied.

I. FACTUAL BACKGROUND

Amax Coal Company, a division of Amax, Inc., is in the business of operating coal mines, primarily bituminous coal mines in the midwestern United States. It bargains with the United Mine Workers of America (the Union or the UMWA) for its midwestern mines as a member of the Bituminous Coal Operators Association (BCOA). In 1972, Amax opened the Belle Ayr Mine in Gillette, Wyoming, its first sub-bituminous surface mine, and agreed to a contract with the Union covering that mine. The contract contained most of the same terms as the national BCOA contract. The BCOA contract, and the similar contracts signed by the western surface mines, were scheduled to terminate on November 12, 1974.

In 1974, the Union decided to seek contract terms for the western mines that would depart significantly from the BCOA's present contract terms. The Union proposed that a multi-employer bargaining group be formed by the western mining companies. Those com-

panies that agreed to bargain through a multi-employer association were to be granted sixty day extensions of their contracts. Amax's request for this sixty day extension was rejected by the Union. Additionally, the Union made clear that it viewed Amax as a member of the multi-employer bargaining association and warned that "[i]f you don't get into this association, you are going to have problems everywhere. You know how coal miners are." App., at 38a. Amax thereafter filed the initial unfair labor practice charge in this case alleging, *inter alia*, that the Union's refusal to bargain separately with Amax violated the Act.

Amax made two more unsuccessful attempts to initiate bargaining with the Union. On January 11, Amax negotiators hand-delivered a new contract offer to UMWA's General Counsel Joseph Yablonski in a last minute effort to avoid the strike scheduled for the next day. Yablonski refused even to meet with them and, on January 12, the Union struck Amax and the other western mines as scheduled. On January 18, Amax sent the Union a telegram requesting negotiations; this request was ignored. Upon learning that the Board's General Counsel intended to seek an injunction against the Union's conduct, Yablonski agreed to meet separately with Amax and to submit to Amax the new contract proposal that the Union had prepared for its other negotiations.[1]

The parties held eight negotiating sessions between February 3 and February 18. Although they reached tentative agreements on more than forty items included in the Union's proposal and the Union agreed to accom-

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1. The proposal was submitted to Amax and to the multi-employer bargaining group, the Peabody Group, on January 24, and to the Pittsburgh & Midway Coal Company (P & M) about a week earlier. The Union had broken off negotiations with the Peabody Group on January 15 because of lack of progress, but had continued negotiating with P & M.

modate Amax on several items, the parties remained far apart on many basic issues. Three more unsuccessful meetings were held between February 26 and March 7.[2]

On March 14, Elkins Payne, Amax's Vice-President, and Daniel Gruender, Amax's attorney, met with Daniel Edelman, the Union's negotiator, and presented him with a complete contract proposal, which Payne stated was Amax's final offer.[3] Payne stated that this was a package proposal, and that the Union must either accept or reject the entire package. He also emphasized that unless the Union agreed to accept the entire final proposal by the close of the business day on March 17 Amax would consider the proposal rejected and would proceed to implement its terms.

The Union's bargaining council did not begin considering Amax's proposal until the afternoon of March 17 and had not reached a final decision by the end of the day. Amax considered the Union's failure to accept the proposal as a rejection. Within the next week, the Belle Ayr Mine was again in operation under the terms of Amax's final proposal. On April 11, the Union formally rejected Amax's proposal.

The parties had only one negotiating session during the three months following Amax's implementation of

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2. During the February 26 meeting, the Union submitted as its new contract proposal the agreement it had reached with the Peabody Group on February 22. On March 4, the parties met with a federal mediator. The Union suggested that a "memorandum of understanding" be used to clarify the intent of some contractual provisions and to accommodate any peculiar conditions at the Belle Ayr mine. Amax Vice-President Elkins Payne met separately with Union negotiator Daniel Edelman on March 7 to explore further the possibility of using a "memorandum of understanding" to iron out some of their differences.

3. The new proposal modified more than forty sections of Amax's previous proposal to conform to the Peabody contract and changed additional sections to agree substantially with it. The remainder of the new proposal was virtually unchanged and those new items were minor.

its final proposal. Although all of the major issues were discussed during this meeting on May 28, no progress was made.[4] Neither party made any concessions.

Following an unofficial discussion in June with Amax Vice-President Roger Sonnemann, Yablonski submitted a new contract proposal to the Company on July 1, that contained concessions in almost every area of dispute. The new proposal did not, however, compromise the Union's position on the termination date, the pension and welfare funds, or the reinstatement of strikers.

On July 17, Yablonski sent a telegram to Amax Board Chairman Ian MacGregor with a copy to Payne, expressing his frustration at having heard nothing from Amax's negotiators since he had submitted the new contract proposal. The telegram further stated that if no agreement was reached by July 22, the date set for an Amax stockholders meeting, the Union intended to file antitrust charges against Amax with the Federal Trade Commission. Payne agreed to meet with Yablonski on July 21.

Little was accomplished at the negotiations on July 21 and 22. Amax continued to reject all but a few relatively minor items in the Union's new proposal. On the afternoon of July 22, the Union filed charges with the FTC; Union representatives also picketed Amax's stockholders meeting and voiced their complaints about the negotiations during the meeting. Although negotiations resumed on August 7 and 8, they again proved unproductive. On August 18 and 19 Yablonski and

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4. The Union would not compromise its demand for a common expiration date with the Peabody contract or its insistence on the Union's multi-employer pension fund. Amax's position was that the Union should be interested in the level of benefits, and that the administrative arrangements should be left to the Company. Both parties disagreed on the question of reinstating strikers, and Amax continued to object to the clauses in the Peabody contract that it believed to be unlawful.

Payne exchanged telegrams accusing each other of responsibility for the negotiating deadlock.

Negotiations continued sporadically through the fall and winter of 1975. On November 14 the Union made a new contract offer containing more concessions. The parties made no progress toward an agreement, however, and negotiations ended in February, 1976 amid reciprocal accusations of bad faith.

II. COLLECTIVE BARGAINING REPRESENTATIVES

A. Coercion of Amax to Join the Peabody Group

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining. . . ." 29 U.S.C. §158(b)(1)(B). The Board found that "by attempting to compel [Amex] to relinquish its right to negotiate independently and instead negotiate through a multi-employer association, the Union engaged in a classic example of the type of conduct which Congress sought to proscribe in enacting Section 8(b)(1)(B) of the Act." 238 N.L.R.B. No. 214 at 12-13. (footnote omitted). Substantial evidence supports this conclusion.

On November 2, 1974, Arnold Miller, the Union's President, sent identical letters to each of the twelve western mining companies whose employees were represented by the Union, explaining the Union's new approach to western bargaining and proposing that the mining companies execute "a single successor Sub-bituminous and Lignite Agreement." App., at 353a (iii). The letters also stated, "Contingent upon your assent to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974." *Id.*

On November 6, Hollie Hopper, Amax's President, responded that Amax would be unable to bargain with the Union until the Board disposed of a representation

petition at the Belle Ayr Mine filed by another union. A few days later, Amax Vice President Payne telephoned Miller's assistant, Ed James, to confirm this position. Payne told James that Amax preferred to bargain independently for the Belle Ayr Mine, and asked whether it could receive the sixty day contract extension without joining the multi-employer group. James replied that unless Amax joined the employer association it would not get the two month extension; but he promised to look into the possibility of extending Amax's contract until after the pending representation election. The Union subsequently notified Amax that it would extend the contract thirty days, to December 12.

On November 23, the day after the UMWA won the representation election at the Belle Ayr Mine, Payne drafted a letter to the Union, for Hopper's signature, to explain the conditions under which Amax would consider joining the multi-employer association, the Peabody group.[5] However, because he felt he could better explain in person, his concerns over the amount of influence Amax would exert within the Peabody Group, Payne arranged for a meeting with Union officials instead of mailing the letter.

On November 25, Payne and Hopper met with James and UMWA's General Counsel, Yablonski. Payne explained that Amax was reluctant to join the Peabody Group because it felt that the Group's voting procedures were unfair to it.[6] At the end of the meeting Payne said that after Amax discusses its problems with the Peabody

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5. Four of the western mining companies had agreed to the Union's proposal and formed a multi-employer bargaining group, called "the Peabody Group", after its largest member, the Peabody Coal Company.

6. Voting in the Peabody Group was weighted according to the amount of coal currently produced by each mine. Amax's vote would be based on its current output of about 500,000 tons, even though it would be producing almost 20 million tons before the contract term ended.

Group, it would notify the Union whether or not it would join the Peabody Group. Later that day, Payne mailed the letter he had drafted on November 23, without changing the date on the letter. The letter stated that Amax was "considering participation" in the Peabody Group, and requested that Miller sign and return a copy of the letter thus indicating his agreement with the following three conditions: another extension of Amax's contract to January 12, 1975; an individually executed contract covering only the Belle Ayr unit; and the retention of Amax's right to bargain independently in the future. App., at 362a-63a. The letter stated further that after Miller's confirmation was received, Amax would contact the Peabody Group in order to "resolve any other problems" relating to Amax joining the Group. After signing the November 23 letter, Miller telegraphed Amax that he had signed the "letter of agreement" and was extending Amax's contract to January 12, 1975.

After receiving Miller's telegram, Payne informed Yablonski that Amax had been unable to come to terms with the Peabody Group and thus intended to bargain separately for the Belle Ayr Mine. The Company and Union representatives then discussed their respective contract objectives, and Amax agreed to provide information requested by the Union. At the conclusion of the meeting, Amax Vice President Sonnemann reiterated Amax's decision to bargain independently. Yablonski acknowledged this statement by nodding his head.

Payne wrote to Yablonski the next day confirming the tentative arrangements made at the meeting concerning the upcoming negotiations for the Belle Ayr Mine. Having received no reply to his letter, Payne phoned Yablonski on December 30 and was informed that Yablonski considered Amax to be a member of the Peabody Group.[7] Payne immediately telegraphed

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7. Negotiations between the Union and the Peabody Group began on December 20, 1974. The Union presented no evidence that the Peabody Group ever claimed to represent Amax.

Yablonski that Amax intended to "bargain with the UMWA for the Belle Ayr Mine operation independently." App., at 368a.

On January 6, 1975, a UMWA delegation headed by International Vice President Michael Trbovich met with Amax's bargaining team. Each party's proposal differed substantially from the others' and each sought significant changes from the terms of the 1971 contract. After discussing the Union proposal, the meeting adjourned.

James Marketti, Director of western organizing for the Union, opened the January 7 meeting by announcing that the Union would not negotiate a separate contract for the Belle Ayr Mine and that they were meeting separately with Amax for informational purposes only and not to negotiate. He stated that Amax would be bound by any contract executed by the Peabody Group. An argument on this question ensued, after which the parties agreed to review Amax's proposals without waiving their positions on bargaining. At the end of the meeting, Marketti stated that the Union would strike Amax when the contract extension expired January 12 unless the Union reached agreement with the Peabody Group, and he warned Payne, "If you don't get into this association, you are going to have problems everywhere. You know how coal miners are." In response to an inquiry whether this was a threat to strike Amax's midwestern mines, Trbovich stated, "You know exactly what we are talking about." App., at 38a, 64a. On January 8, Yablonski confirmed by letter the Union's refusal to bargain separately with Amax stating:

> The UMWA expressly and unequivocally rejects your purported withdrawal from the Peabody Group, and we expect you to be bound by any agreement which we may reach in those negotiations.

App., at 368a(ii).

Despite this, the Union argues that its conduct was lawful because it contends Amax joined the Peabody

Group on November 23 and thereafter failed to serve adequate notice of withdrawal prior to the commencement of multi-employer negotiations on December 20, 1974. We disagree.

First, the test of membership in a multi-employer bargaining group is whether the employer has "indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action." *NLRB v. Dover Tavern Owners' Assn*, 412 F.2d 725, 727 (3d Cir. 1969) *quoting Western States Regional Council No. 3 v. NLRB*, 398 F.2d 770, 773 (D.C.Cir. 1968). The Board found that the November 23 letter did not indicate an unequivocal intention to be bound by group action since it predicated Amax's participation in the Peabody Group on two independent conditions: 1) that Miller agree to the three conditions stated in the letter and 2) that the Peabody Group agree to a satisfactory arrangement for allocation of voting rights within the Group. The second condition was not fulfilled. The Board's findings are supported by substantial evidence.

Second, the Board found that even if Amax agreed to be bound by the multi-employer negotiations on November 23, Payne's December 18 letter plainly stated Amax's intention to bargain individually with the Union for a separate contract covering only the Belle Ayr mine. Since Amax clearly disassociated itself from the Peabody Group in timely fashion, the Union's subsequent strike, which was designed to force Amax to join the Peabody Group, violated Sections 8(b)(1)(B) and 8(b)(4)(A).[8] 29 U.S.C. §§158(b)(1)(B), 158(b)(4)(A).

Finally, substantial evidence supports the Board's conclusion that the Union's refusal to negotiate with Amax from January 7, 1975 to February 3, 1975, while

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8. Section 8(b)(4)(A) proscribes strikes and other coercive conduct by Unions where "an object thereof is: (A) forcing or requiring any employer . . . to join any . . . employer organization ...." 29 U.S.C. §158(b)(4)(A).

insisting that Amax would be bound by the Peabody negotiations, violated Section 8(b)(3), 29 U.S.C. §158(b)(3).

B. *Trust Fund Representatives*

Amax argues that the Union's conduct in insisting to impasse and striking subsequently to obtain Amax's participation in the Union's pension and welfare trust funds, whose management trustee is not selected by Amax, is coercion in the selection of a representative for the purposes of collective bargaining in violation of Sections 8(b)(1)(B) and 8(b)(3). We are thus asked to decide whether employer trustees of a Section 302(c) Taft-Hartley Trust are collective bargaining representatives within the meaning of Section 8(b)(1)(B). The Board, relying on its decision in *Central Florida Sheet Metal Contractors Assoc., Inc.*, 234 N.L.R.B. No. 162 (1978), held that the trust fund's management trustee is not a collective bargaining representative within the meaning of Section 8(b)(1)(B).

In *Central Florida*, the Board concluded that the trustees of a jointly administered, multi-employer trust fund are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan, and are not, therefore, collective bargaining representatives. The Board expressly referred to and rejected this Court's decision in *Associated Contractors of Essex County, Inc. v. Laborers Int. Union*, 559 F.2d 222 (3d Cir. 1977), 234 NLRB at 1247 n.31.

In *Associated Contractors*, this Court considered whether the Taft-Hartley Act's objective of equal representation by employer and employee trustees on the board of welfare and pension funds "is thwarted when the employer trustees represent two rival associations." 559 F.2d at 223. We held that the equal representation clause was violated when trustees, representing a rival association not a party to the original trust agreement,

were added to the board without the consent of the original employer association. The amendments in that case were found to create the potential for abuse and combination of alliances placing the union in a dominant position — four were union trustees, two were original employer trustees, and two were employer rival trustees.

This Court, through Judge Rosenn, reviewed the law of equal representation. Relying on *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959), we noted that Section 302 was enacted to prevent "the possible abuse by union officials of the power which they might achieve if welfare funds were left to their sole control." 559 F.2d at 226. Thus, the requirement of equal employer-employee representation in the joint administration of trust funds was central to the congressional scheme set forth in Section 302. The Court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. *See Lamb v. Carey*, 162 U.S. App.D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown*, 374 F.Supp. 191 (N.D.Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L.Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section

302(c)(5). Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

The logic and holding of this court's opinion in *Associated Contractors* are equally applicable to the facts of this case. Accordingly, we hold that the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's pension and trust fund violates Sections 8(b)(1)(B) and 8(b)(3).

C. *Joint Training Committee*

The Board concluded that the Union did not violate Section 8(b)(1)(B) or 8(b)(3) by insisting to impasse for the establishment of a committee to develop adequate safety training programs for employees. Amax argues that because the Joint Training Committee would have members appointed by other western mining companies, the Union's demand for the committee was an attempt to coerce Amax in the choice of its collective bargaining representatives. Because the Committee's function is merely advisory, they are not collective bargaining representatives within Section 8(b)(1)(B).

Article XV of the Union's January 27 contract proposal provided for the establishment of a Joint Western Surface Mining Industry Training Committee composed of three union representatives and three employer representatives "appointed by the Employers." It further provided that each side would also assign a full time "trained representative" to assist "the Committee and the employers signatory hereto in developing and implementing the various training programs provided for herein." The Article also set forth the types of training programs required with minimum standards for each. specifically providing that each program "shall be developed by the Employer [Amax]." App., at 105a.

The Board reasonably concluded that since the contract clause specifically reserved to the particular employer involved the right to develop the actual training program to be implemented at its mine the function of the Joint Committee must be merely advisory. Although the training programs referred to in Article XV, Sections (b) - (f) of the Union proposals are to have certain minimum standards, they are all programs in which Amax was in control, with power to put the programs into effect or not. The training representatives have no power to do more than advise and recommend.

Amax also raises the same issues with regard to the Mine Health and Safety Committee. Article III(c) states, "[T]he Union and Employer shall jointly establish and fund a course of health and safety training for members of the Mine Health and Safety Committee . . . The training program shall be established by the Joint Western Surface Mining Industry Training Committee." App., at 106a. The Board concluded that Article III(c)(2), even if not properly before it, should be interpreted consistently with Article XV and thus there is no question that the committee members are not collective bargaining agents. Moreover, the Safety Committee is composed of employees chosen by the Union and Section 8(b)(1)(B) prevents the Union from interfering in the selection of the employer's bargaining representative—not the union's. Accordingly, we will not disturb the Board's order on this issue.

D. *The District Agreements*

Article I of the Union's contract proposal would have carried forward any District Agreements to which Amax was a party.[9] Amax argues that this clause violates Section 8(b)(1)(B) because it requires Amax to accept as its bargaining representative persons represent-

9. District Agreements are local agreements between a district of the Union and a local group of employers.

ing associations of other employers in other units who negotiated or would negotiate changes in the District Agreements. The Board concluded that the Union had not insisted on this clause to impasse and therefore there was no violation. Substantial evidence supports this finding.

On January 6, Amax negotiators objected to this proposal believing it would bind Amax to agreements negotiated by other employers in the area, the contents of which Amax had no knowledge. On February 26, however, Union negotiator Edelman produced copies of the District Agreements for the Amax negotiators and assured them that since Amax was not a party to any of them, the proposed contract clause would have no effect upon Amax. During his March 7 meeting with Payne, Edelman offered to reduce this assurance to writing in the form of a memorandum of understanding that would be included as an addendum to the contract. Although the Union left the proposed clause on the table until November 14, there was almost no further discussion of it, and neither party thereafter indicated that it was a significant problem.

III. NONMANDATORY CONTRACT PROPOSALS

A. *Coal Lands and Enabling Clauses*

Amax argues that the Union bargained to impasse on two clauses that were not mandatory subjects of bargaining and thus violated Sections 8(a)(5) and 8(b)(3). The Enabling Clause would require Amax, during the term of the Belle Ayr contract, to agree to the same contract terms for any of its other sub-bituminous mines whose employees selected the UMWA to bargain for them.[10] The Coal Lands clause made it clear that Amax

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10. The Enabling Clause provided:

> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].

would have to do this for other facilities whether they were already in operation at the time the Belle Ayr contract was signed or were acquired and put into production during the term of the Belle Ayr contract.[11] The Administrative Law Judge (ALJ) held the two clauses were nonmandatory subjects of bargaining. Relying on its decision in *UMWA and Lone Star Steel Co. and Surface Industries, Inc.*, 231 N.L.R.B. No. 88 (1977), the Board disagreed and held the clauses to be mandatory subjects and held that the Union's insistence to impasse on them was not in violation of 8(b)(3). It stated:

> In view of the foregoing, we conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by the Charging Party during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees

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NOTE 10 — *(Continued)*

In the November proposal, the coal lands clause was deleted entirely and the Enabling Clause was changed to read:

> This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this Agreement, or which may hereafter (during the term of this Agreement) be put into production or use on the leases attached hereto as Addendum A.

11. The Coal Lands Clause provided:

> (f) . . . this agreement covers the operator of all coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

> at the Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company*, both clauses serve to "remov[e] the economic incentive which might otherwise encourage [the Charging Party] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining.

App., at 49a (iii) - (iv).

We cannot agree. Whether these clauses are mandatory subjects of bargaining depends on whether they come within the area of "wages, hours and other terms and conditions of employment." *See NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Unlike wages and conditions of employment, the scope of the certified bargaining unit is not a mandatory subject and insistence to the point of impasse on restriction or expansion of the bargaining unit is an unfair labor practice. *Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970). The clauses at issue here would require Amax to conduct negotiations on a basis broader than the certified unit. They would require Amax to bargain about wages and other conditions of employment of employees in other units. While the Union has a valid concern in protecting the employees against a shift of production to another mine in order to evade the Union's standards and wages at Belle Ayr, the clause here refers to all new operations and is much broader than necessary to accomplish this goal. Indeed the clause requires that the agreement be put into effect *in toto* elsewhere, including the non-economic provisions that have no bearing on unit employees.

We have reviewed the record and also conclude that there are sufficient facts to support the finding that the

clauses were bargained to impasse. Although there is a fine line between work preservation and bargaining unit expansion, the ALJ was correct in finding a violation of Section 8(b)(3) and thus the Board's order on this issue will not be enforced.

B. *The Exemptions Clause; the 1950 Pension Trust; the Exclusion of Local 1854*

Amax argues that the Union violated Section 8(b)(3) by insisting to impasse that Amax accept its proposed exemptions clause, that Amax contribute to the Union's 1950 Pension Fund, and that Local 1854 not be a signatory party to the contract. These issues are plainly not before this Court, however, because the Board declined to decide either whether the parties reached impasse on these issues, or whether there would be a violation even if they did reach impasse on them. The only question before the Court with respect to these proposals is whether the Board abused its discretion in declining to decide these issues because the General Counsel did not include them in the complaint. In the circumstances of this case the Board's refusal to decide these issues was well within its broad discretion to control the fairness of its own proceedings.

The facts are as follows. The complaint in this case alleged violations of Section 8(b)(3) for insisting to impasse on nonmandatory proposals, and then specifically stated each proposed clause that was alleged to have been insisted to impasse; the three clauses at issue here were not mentioned.

Paragraph 17(k) of the complaint alleged bad-faith bargaining. During the first two days of the hearings the Union objected to evidence that was being offered to show certain contract proposals as nonmandatory, but had not been so alleged in the complaint. Because of the quantity and complexity of the issues involved, the ALJ made it very clear that the Charging Party, Amax, and

the General Counsel would be strictly limited to the allegations in the complaint. Thereafter, the General Counsel's motion to amend the complaint specifically to include additional illegal and nonmandatory contract proposals was granted. These three disputed clauses were not in this amendment. The General Counsel was also permitted to amend paragraph 17(k) to allege overall bad-faith bargaining. However, paragraph 17(k) was not amended for the purpose of being a catchall for allegations not specifically named in the complaint as nonmandatory subjects. Thus paragraph 17(k) of the Board's complaint reads:

> Respondent has refused to bargain in good faith with the employer, has engaged in surface bargaining, has negotiated with the employer in bad faith, has exhibited a predetermined resolve not to agree to any proposal but their own, and has insisted upon including nonmandatory and unlawful clauses in any collective bargaining agreement.

Although evidence was received on the Union's bargaining position about these proposals, these issues were not fully litigated. Thus, under the circumstances, it was not unreasonable for the ALJ to conclude that the Union had not received adequate notice and to decide these issues would deny the Union a fair trial. *See Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 163 (8th Cir. 1968) ("General Counsel's position . . . would not be consonant with administrative due process or fundamental fairness [because] . . . [where] specific acts violative of the section are enumerated, the proof and subsequent findings should be limited to those matters, absent amendment.")

IV. CONTRACT PROPOSALS VIOLATIVE OF SECTION 8(e)

Section 8(b)(4)(A) makes it an unfair labor practice for a union to engage in a strike or other coercive con-

duct where " an object thereof is . . . forcing or requiring any employer to enter into any agreement" which is prohibited by Section 8(e). A union violates its bargaining duty under Section 8(b)(3) if it insists to impasse that an employer agree to a clause which violates Section 8(e). *See NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342, 349 (1958). The Board found that the union bargained to impasse and struck in support of six proposed clauses which the Board found to violate Section 8(e).

Section 8(e) makes it "an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person." In determining whether the particular clauses here violate Sections 8(e) and 8(b)(4), we must inquire into "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [Amax's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." *National Woodwork Mfrs. Assoc. v. NLRB*, 386 U.S. 612, 644 (1967).

A. *Successorship Clause*

The Union proposed a clause that would require Amax to condition any sale or conveyance of its operations upon the successor's assumption of Amax's obligations under the agreement. This "successorship clause" provided:

> [T]his Agreement shall be binding upon all signatories hereto and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this agreement. Provided that the

> Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The Board concluded that this proposal was lawful, both because the transfer of a portion of Amax mining operations to a successor does not constitute "doing business" within the meaning of Section 8(e), and because the effect of the clause was primary.

The phrase "doing business" refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union demands. *National Woodwork Mfrs. Assoc. v. NLRB*, 386 U.S. at 619-633. Thus, as noted earlier, Section 8(e) was designed to protect neutral employers and their employees, not involved in a labor dispute, from being pressured to assist a union in a dispute with another employer.

Here, it is clear that the sale by Amax of all or part of its business operations would involve no continuing relationship with the purchaser. There is therefore no possibility of involving Amax in a labor dispute between the purchaser and its employees.

Amax argues, however, that the trading of dormant coal land is a common practice in the coal industry and that the successorship clause would affect adversely Amax's freedom to carry on this allegedly necessary activity. The ALJ found otherwise:

> Amax . . . operates several mines in the midwest, not covered by the contract negotiations involved in this case, but operates only one western mine, the Belle Ayr Mine. However, Amax owns or leases substantially more parcels of coal land than those which make up the Belle Ayr Mine and its midwestern mines. Amax continually purchases coal lands but "seldom sells" coal lands, rather it

> continually trades coal lands which it owns or leases for coal lands owned or leased by other coal producers. The reason for this is that, since many of the parcels or coal leases acquired by Amax are small and noncontiguous, it is essential for Amax to trade these parcels for others in order to put together a large enough contiguous block of land to support a "viable mining plan," one which will enable Amax to use its land to produce coal. In this regard, the record establishes that Amax does not use its coal lands to produce or process coal unless the area is large enough to support 15 or 20 years of mining operations. *It is a fair inference, from the aforesaid circumstances, that Amax's trading of its coal lands involves noncontiguous parcels not used by Amax to produce or process coal since they do not constitute a "viable mining plan." It is also a fair inference that coal lands which constitute a viable mining plan such as the parcels which comprise the Belle Ayr Mine and other facilities which are being used to produce or process coal are seldom if ever traded by Amax.*

App., at 122a. (emphasis added).

After reviewing the record, we conclude that the ALJ's findings regarding the frequency and nature of lands traded by Amax are supported by substantial evidence.[12]

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12. The Company's attempt to stretch the Enabling and Coal Lands clauses to apply the Successorship clause to Amax's dormant coal lands must fail. Under the Enabling and Coal Lands clauses, the contract would only become effective with respect to those coal lands which Amax put "into production" during the term of the contract, and then only after the UMWA became the recognized bargaining representative at the new facility, a development which obviously cannot occur until Amax has employees working there. And as Amax concedes, until its trading of coal lands has successfully resulted in a "viable mining plan," it has "no reason to hire miners to dig coal." Brief at 35.

Moreover, even if the conveyance of a portion of Amax's coal mining operations, which is restricted by this clause, constituted "doing business" within the meaning of Section 8(e), the successorship clause is nonetheless lawful because its effect is primary. The clause was clearly designed to assure that Amax's own employees would retain their current contractual benefits in the event that their place of employment is sold to a new employer. The only obligation which the clause would place on Amax is to secure the purchaser's agreement to adopt the contract *before* Amax sells the mining operation to the purchaser — that is, while the employees are still Amax's employees. Once the mining operation is actually transferred, the clause would permit the Union to seek compliance only from the new employer, who would have stepped into Amax's shoes and thus become the primary employer of Amax's former employees covered by the contract. In short, since this clause serves to benefit only Amax's own employees, and does not seek to enlist Amax's aid in affecting the labor relations of anyone who is not the employer of those same employees, the effect of the clause is primary.[13]

B. *"Leasing-Licensing Out" Clause*

The Union next challenges the Board's ruling that the proposed "leasing-licensing out" clause violated Section 8(e) because a transfer under the clause constituted "doing business" within the meaning of Section 8(e).

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13. Because the complaint in this case did not specifically allege that the Successorship clause was a nonmandatory bargaining subject apart from its legality under Section 8(e), the ALJ made no finding with respect to that question. The Company's exceptions to the Board relating to the ALJ's findings with respect to the Successorship clause do not question this issue, and because it filed no motion for reconsideration with the Board challenging the Board's subsequent failure to deal with it, Section 10(e), 29 U.S.C. §160(e), of the Act precludes the Company from raising the issue in this Court.

Additionally, the Union argues, that even if such a transfer comes within Section 8(e), it is lawful because, by the very nature of the coal mining business, it is a primary work perservation clause.

The Board's conclusion is correct. The two restrictions on licensing out coal operations effectively control the labor relations of the licensee employer and benefit union members generally rather than Amax's own employees. The union members required to perform do not have to come from Amax. Thus the clause forces the licensee employer to abide by the union recognition portion of the contract. It serves only the union's organizing interests and does not protect the Amax employees' work standards.

On the "doing business" issue of Section 8(e), it is clear that the clause requires a continuing relationship between Amax and the licensee employer that would permit the Union to force Amax to pressure the licensee employer to comply with Union's future demands. Since the clause forbids Amax from licensing out coal mining operations absent compliance with the contract terms for the licensee's employees, Amax would be obliged to discontinue the licensing agreement if the licensee ever stopped recognizing the Union or abiding by the other terms of the Union's contract with Amax.

C. *Coal Transportation Clause*

The coal transportation clause provided that Amax could subcontract the transportation of its coal "only to a contractor employing members of the UMWA under their agreement." The Board adopted the ruling of the ALJ that the Union violated Sections 8(b)(4) and 8(b)(3) by insisting to impasse and striking to obtain Amax's agreement to its coal transportation clause. We agree.

The clause requires that the subcontractor shall not only agree to provide its employees with the economic benefits of the contract, but to adhere to the noneconomic terms as well. It also provides that Amax

may contract out only to contractors who employ Union members. To that extent, the clause seeks to aid UMWA members generally rather than those union members employed at the Belle Ayr Mine. The continuance of the relationship between the signatory employer and any contractor depends on the contractor's decision to employ UMWA as his employees' bargaining representative and not on the contractor's maintenance of union wage scales or conditions. Its effect is therefore secondary and unlawful.[14] *See A. Duie Pyle, Inc. v. NLRB*, 383 F.2d 772, 777-78 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

D. *Repair and Maintenance Work*

The ALJ found and the Board agreed that the Union's Repair and Maintenance Work Clause proposal violated Section 8(e). The proposal prohibited contracting out repair and maintenance work customarily performed by classified employees at the mine or central shop unless the work was performed under a manufacturer's warranty or the employer did not have available equipment or regular employees with necessary skills available to perform the work at the mine or central shop, "provided, however, that the work, shall be performed by UMWA members to the extent and in the manner permitted by law." App., at 134a. The Board's decision will be enforced, for as this Court stated in *A. Duie Pyle, Inc. v. NLRB*, 383 F.2d at 777-78:

> The present provisions, to the extent that they require the subcontractees to become employees and members of the union, therefore must also be

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14. The Union argues that the unlawful portion of the clause is severable from the balance of the clause and therefore only that phrase should be stricken. However, since there are no executed contract terms here, there is no illegal agreement to render void and no need to determine whether or not a portion of any contract clause can be lawfully preserved.

declared invalid. As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize. Nor may it by this means seek to coerce self-employed persons to become union members. Congress had made this clear by §8(b)(4)(A) which prohibits secondary boycotts with an object of "forcing or requiring any employer or self-employed person to join any labor * * * organization * * *."

E. *Construction Clause*

The union proposed a clause that would permit "construction of mine or mine related facilities" to be "performed by such outside contractors as are designated by the Employer." It provided, however, that when such work was contracted out, it would be "under the jurisdiction of the UMWA" unless "UMWA contractors qualified to do the work are not available." Additionally, the Union's proposal specified that if a dispute arose over Amax's use of a non-UMWA contractor, Amax would have the burden of proving "that the UMWA contractors qualified to do the work are not available."

For the reasons given in connection with the "coal transportation" and "leasing-licensing out" clauses, the ALJ concluded that this clause was a "union signatory" agreement which violated Section 8(e). We agree. This clause prohibits Amax from subcontracting to a non-UMWA subcontractor even if he maintains working conditions equivalent to Amax's. It only serves the union's own interest in making sure the subcontractor recognizes the Union, and does not provide any benefit to Amax's employees.

F. *Work Jurisdiction Clause*

The Union's work jurisdiction clause specified that "contracting, subcontracting, leasing and subleasing

and construction work" would be "conducted in accordance with" the requirements of other clauses. The Board found that to the extent that this clause would require Amax to comply with the other clauses found to be illegal, the work jurisdiction clause was equally unlawful. We agree. Since the work jurisdiction clause incorporates the other illegal clauses, it likewise violates Section 8(e).

V. *FAILURE TO NOTIFY THE FEDERAL MEDIATION AND CONCILIATION SERVICE*

Section 8(d)(1) prohibits a party to a collective bargaining agreement from modifying or terminating the agreement without serving written notice on the other party sixty days prior to the expiration date. Sections 8(d)(3) and (4) require a party to a collective bargaining agreement to notify the Federal Mediation and Conciliation Service (FMCS) within thirty days after such notice of the existence of a dispute and to refrain from striking within the sixty days after such notice has been given. Although Section 8(d)(1) specifically mentions written notice and Section 8(d)(3) does not, the FMCS regulations do require written notice. 29 C.F.R. §1402.1.

The Board found that the UMWA failed to give oral or written notice to the FMCS as required by Section 8(d)(3) and therefore violated Section 8(b)(3) of the Act by striking without complying with Section 8(d). The UMWA argues that there was implicit written notice, that even if no written notice was given, none is required under the statute, that oral notice was given, and that even if no oral notice was given, actual knowledge of the dispute is sufficient. Substantial evidence supports the findings that there was no written or oral notice.

On September 11, 1974 and October 17, 1974, the Union notified the Federal Mediation and Conciliation Service by letter that it was terminating the 1971 National Bituminous Coal Wage Agreement and that it in-

tended to bargain with the employers who were parties to those agreements, either as members of the relevant employers' association or as independent signatories. Attachments to the letter of September 11, 1974 specifically referred to the Union's negotiations with the BCOA — the employer association that negotiated the National Bituminous Coal Wage Agreement — and with the Association of Bituminous Contractors and included sample form letters addressed to "All Independent Signatories" of the 1971 Agreement and the 1972 Coal Mine Construction Agreement. Nothing was said, however, concerning the existence of a contractual dispute between the Union and Amax over the Belle Ayr Mine. The Union concedes that its letter and attachments never specifically mention the dispute with Amax over the Belle Ayr Mine. Brief of UMWA at 69. It argues, however, that Section 8(d)(3) does not require written notice. Nonetheless, even if this were a correct interpretation of Section 8(d)(3), there is virtually no evidence to support the Union's allegation of oral notification. The evidence referred to only indicates an informal chat between an FMCS mediator and Yablonski without specific mention of Belle Ayr. As a result, the Board was correct to conclude that it was unnecessary to decide whether written notice was required because no oral notice had been given.

Finally, the Union argues that even if it failed to give the FMCS any notice of the Belle Ayr dispute, Section 8(d)(3) is satisfied if the FMCS independently obtained "actual knowledge" of the dispute from other sources. We disagree. Nothing in the statute or in the relevant case law relieves the Union of its statutory duty to notify the FMCS. The purpose of Section 8(d)(3) is "to increase the likelihood that the mediation services will have sufficient time to intervene. The method Congress chose to serve this purpose was to assign to one party, the initiating party, a fixed and definite responsibility for

notifying the mediation services." *Hooker Chemicals & Plastics Corp. v. NLRB*, 573 F.2d 965, 970 (7th Cir. 1978). This purpose is not fulfilled when the FMCS happens to find out about a dispute on its own.

VI. OVERALL FAILURE TO BARGAIN IN GOOD FAITH

Amax charged the Union with a failure to bargain in good faith and the Union raised the same claim against Amax as an affirmative defense. The Board held that neither party had engaged in bad faith bargaining. Except for that conduct which we found to constitute violations of the Act, we conclude that as to the remaining issues the Board's finding that neither party engaged in bad faith bargaining is supported by substantial evidence.

VII.

For the foregoing reasons the company's petition for review will be granted and enforcement of the Board's order will be denied insofar as it relates to the trust fund representatives and to the "enabling" and "coal lands" clauses. The Union's petition for review will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2310

AMAX COAL COMPANY, A Division of AMAX, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854, and
UNITED MINE WORKERS OF AMERICA,
Intervenors

No. 78-2489

UNITED MINEWORKERS OF AMERICA,
LOCAL NO. 1854 and
UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

AMAX COAL COMPANY, A Division of AMAX, INC.,
Intervenor

PETITIONS FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD and
CROSS-APPLICATION FOR ENFORCEMENT

Argued October 18, 1979

Before: GIBBONS,* HIGGINBOTHAM, *Circuit Judges* and ZIEGLER, *District Judge***

ORDER AMENDING SLIP OPINION

It is ordered that the slip opinion in the above-entitled cases filed February 1, 1980, be amended as follows:

Page 2 - insert "PHILIP M. PRINCE, ESQUIRE" after "DANIEL F. GRUENDER, ESQUIRE (Argued)."

By the Court:

A. LEON HIGGINBOTHAM, JR.
Circuit Judge

Dated: February 12, 1980

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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*Judge Gibbons did not participate in the decision of the court, although he heard oral argument.

**Honorable Donald E. Ziegler of the United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX B

In the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2310

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA, INTERVENORS

No. 78-2489

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., INTERVENOR.

JUDGMENT

Before: GIBBONS,* HIGGINBOTHAM, *Circuit Judges* and ZIEGLER, *District Judge***

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*Judge Gibbons did not participate in the decision of the Court, although he heard oral argument.

**Honorable Donald E. Ziegler of the United States District Court for the Western District of Pennsylvania, sitting by designation.

THIS CAUSE came on to be heard upon petitions filed by United Mine Workers of America, and United Mine Workers of America, Local 1854, and Amax Coal Company, to review an order of the National Labor Relations Board issued against United Mine Workers of America, Local No. 1854, and United Mine Workers of America, their officers, agents, and representatives on September 29, 1978, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on October 18, 1979, and has considered the briefs and transcript of record filed in this cause. On February 1, 1980, the Court being fully advised in the premises, handed down its decision granting the company's petition for review; denying enforcement of the Board's order as it relates to the trust fund representatives and to the "enabling" and "coal lands" clauses and denying the Union's petition for review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Petitioners, United Mine Workers of America and United Mine Workers of America, Local 1854, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between it and the Company, involving the bargaining unit described hereinabove, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the National Labor Relations Act (hereinafter called the Act).

(b) Engaging in, calling or causing the employees in the appropriate unit described hereinabove to engaged in a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

(c) Restraining or coercing the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described herein.

(d) Engaging in, calling or causing the employees in the appropriate unit described herein to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

(e) Refusing to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(f) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

(g) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the bargaining unit described hereinabove.

(h) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: enabling an application of contract to coal lands, which are nonmandatory subjects of bargaining.

(i) Inducing or encouraging any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, proc-

ess, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses, which are prohibited by Section 8(e) of the Act.

(j) Restraining or coercing Amax Coal Company in the selection of its collective bargaining representative by insisting to the point of impasse that Amax Coal Company participate in the UMWA's multi-employer pension and welfare funds.

(k) Restraining or coercing employees in the exercise of their rights guaranteed Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix." Copies of said notice, on forms to be provided by the Regional Director for Region 27, (Denver, Colorado) of the National Labor Relations Board shall, after being duly signed by representatives of Petitioners, be posted by Petitioners immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Petitioners to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for forwarding to Amax Coal Company for information and, if it is willing, for posting by it in all locations where notices to its employees in the unit described hereinabove are customarily posted.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this judgment what steps Petitioners have taken to comply herewith.

IT IS FURTHER ORDERED that each party shall bear its own costs.

BY THE COURT

/s/ _____

A Leon Higginbotham
Circuit Judge

DATED: APRIL 3, 1980

APPENDIX

NOTICE TO MEMBERS

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between United Mine Workers of America, Local No. 1854, and United Mine Workers of America, and the Company, involving the bargaining unit described below, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act. The bargaining unit is:

> All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT engage in, call, or cause the employees in the appropriate unit described above to engage in, a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

WE WILL NOT restrain or coerce the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described above.

WE WILL NOT engage in, call, or cause the employees in the aforesaid appropriate unit to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

WE WILL NOT refuse to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: enabling an application of contract to coal lands, which are nonmandatory subjects of bargaining.

WE WILL NOT induce or encourage any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract

or agreement containing the above-described clauses which are prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce Amax Coal Company in the selection of its collective bargaining representative by insisting to the point of impasse that Amax Coal Company participate in the UMWA's multi-employer pension and welfare funds.

WE WILL NOT restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

APPENDIX C

In the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2310 and 78-2489

AMAX COAL COMPANY, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT;

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA, INTERVENORS

No. 78-2310

UNITED MINE WORKERS OF AMERICA,

LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS;
AMAX COAL COMPANY, ETC., INTERVENOR

No. 78-2489

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, ROSENN, HUNTER, WEIS, GARTH, HIGGIN-

BOTHAM, *Circuit Judges* and ZIEGLER, *District Judge.**

The petition for rehearing filed by

National Labor Relations Board in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing the court in banc, the petition for rehearing is denied.

BY THE COURT, /s/_____
A Leon Higginbotham
Circuit Judge

DATED: MAY 29, 1980

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*Hon. Donald E. Ziegler of the U.S. District Court for the Western District of Pennsylvania, sitting by designation.

Judges Gibbons and Sloviter did not participate in the disposition of this Petition for Rehearing.

APPENDIX D

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 27-CB-900 and 27-CC-571

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA
and
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

DECISION AND ORDER

On March 22, 1977, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the Charging Party and the Respondents filed exceptions and supporting briefs, the General Counsel filed cross-exceptions and a brief in support thereof, the Charging Party filed a reply brief, the Respondents filed an answering brief, and the Secretary of Labor filed an *amicus curiae* brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of

[1] The requests for oral argument submitted by the Respondents and the Charging Party are hereby denied as the record, the exceptions, and the briefs adequately set forth the issues and positions of the parties.

[2] Subsequent to the issuance of the Administrative Law Judge's Decision herein, the Board issued its Decision in *United Mine Workers of America (Lone Star Steel Company and Surface Industries, Inc.)*, 231 NLRB No. 88 (1977), wherein it found, *inter alia*, that the "successorship clause" at issue in this proceeding did not fall within the proscription of Sec. 8(e) of the Act. Accordingly, in adopting the Administrative Law Judge's finding regarding that clause, we additionally rely on our Decision in *Lone Star Steel Company, supra*.

In the portion of his Decision entitled "The Joint Western Surface Mining Industry Training Committee" the Administrative Law Judge at times inadvertently referred to art. XV(a) as art. II(a). The Administrative Law Judge's Decision is hereby accordingly amended.

[3] We adopt the Administrative Law Judge's conclusion in sec. III,C,3,(c) of his Decision that the Union did not violate Sec. 8(b)(3) of

the Administrative Law Judge only to the extent consistent herewith, and to adopt his recommended Order as modified.

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the Act with regard to the district agreements contract proposal because, assuming this clause to be a nonmandatory subject of bargaining, the record evidence does not show that Respondent insisted on this issue to the point of impasse.

We adopt the Administrative Law Judge's conclusion contained in sec. III,C,7 (c) of his Decision that the evidence fails to establish that Amax engaged in overall bad-faith bargaining and that the Union's asserted defense on this ground is thus without merit. See *Times Publishing Company*, 72 NLRB 676, 682 (1947). We find it unnecessary, however, to pass on Amax's bargaining posture during October, November, and December 1975, since in the circumstances here the events occurring during this time, whatever their character, could not be viewed as retroactively excusing the Respondents' prior unlawful conduct. Since we find it unnecessary to pass on these events we of course decline to consider the applicability of *N.L.R.B.* v. *Alva Allen Industries, Inc.*, 369 F.2d 310 (C.A. 8, 1966), and related cases cited by the Administrative Law Judge.

Although the Administrative Law Judge found that the Respondents' conduct, when viewed as a whole, did not violate its statutory obligation to bargain in good faith, he commented, in sec. 7(b) of his Decision, that the Respondents' conduct in first threatening and later filing a complaint with the Federal Trade Commission, alleging that the Charging Party had violated the antitrust laws, was "reprehensible" and "the type of conduct which directly obstructs or inhibits the actual process of discussion at the bargaining table." We are unable to agree with such a characterization of the Respondents' conduct and therefore disavow those comments. The Board has consistently held that its enforcement of the Act should accommodate the "right to all persons to litigate their claims in court." See *Glaziers and Glassworkers, Local Union 767 (Sierra Glass Service, Inc.)*, 228 NLRB 35 (1977); *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382 (1971); and cases cited therein. We are unable to perceive any legitimate distinction as to why our accommodation of that right should be any different than accommodating the right of parties to file a complaint with another administrative agency.

There is now pending before the Board a petition in Case 27-RC-5342, filed by another labor organization (New Acme) subsequent to the hearing in this matter. In that case, New Acme seeks to represent the employees at the Belle Ayr Mine and both the Union involved herein and another labor organization (Operating Engineers) have intervened. In the instant case, the Administrative Law Judge's Conclusion of Law 4 provides that the United Mine Workers of America,

1. The General Counsel and the Charging Party contend that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party in order to compel it to bargain through a multiemployer association. They additionally contend that the strike that did, in fact, occur herein was motivated by the same object and, therefore, that it was violative of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act. The Administrative Law Judge concluded that by predicating an extension of the Charging Party's existing contract upon its agreement to enter into multiemployer bargaining, the Respondents implicitly threatened to strike the Charging Party upon the expiration of the then-existing contract. He viewed such conduct as an attempt to coerce the Charging Party in the selection of its collective-bargaining representative and thus he found that the Respondents had violated the Act as alleged, insofar as the threat was concerned. He further found, however, that the strike which occurred herein on January 12, 1975, was not motivated by a desire to compel the Charging Party to bargain through a multiemployer association and, therefore, he dismissed that portion of the complaint. For the reasons expressed hereinafter, we agree with the Administrative Law Judge that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party unless it agreed to bargain through a multiemployer association. Contrary to the Administrative Law Judge, however, we find merit in the position of the General Counsel and the Charging Party that the strike which subsequently occurred was violative of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act.

Local 1854, has been at all times material herein, and is, the exclusive collective-bargaining representative of the employees employed at the Belle Ayr Mine. In view of the pending petition referred to above, however, it is clear that at the present time the question of whether the Union is the exclusive bargaining representative of the aforesaid employees remains unresolved. Accordingly, we have amended Conclusion of Law 4 to provide that at all times material herein the Union has been the exclusive collective-bargaining representative of the employees at the Belle Ayr Mine.

On November 2, 1974, Arnold Miller, the president of Respondent United Mine Workers of America, hereinafter referred to as the Union, sent identical letters to approximately 12 western coal mine operators, including the Charging Party, with whom the Union had agreements, proposing that they form a multiemployer bargaining association in order to negotiate a single agreement covering those miners. The letter further stated that "contingent upon your assert to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974."

Four of the employers who were signatories to contracts with the Union—Energy Fuels Corporation, Kemmerer Coal Company, Usibelli Coal Mine, Inc., and the Peabody Coal Company (hereinafter referred to as the Peabody Group)—agreed to bargain as a multiemployer association, provided that each would be able to sign a separate agreement. Thereafter, as promised, the Union granted to each of these employers a 60-day extension of their then-existing agreements. On November 6, 1974, the Charging Party's president, Hopper, replied to the Union's proposal by indicating that a pending representation petition at the Belle Ayr Mine would have to be resolved prior to its taking any action regarding the negotiation of a new agreement.[4] Shortly thereafter, Elkins Payne, the Charging Party's vice president of administration and employee relations, essentially reiterated that position in a telephone conversation with Edgar James, an assistant to the Union's president. During this conversation, Payne also indicated that, although the Charging Party would rather

[4] On September 12, 1974, the International Union of Progressive Mine Workers filed a representation petition seeking to represent the Charging Party's employees at the Belle Ayr Mine. Shortly thereafter, Respondent United Mine Workers, Local 1854 (hereinafter referred to as Local 1854), intervened in that proceeding.

On November 22, 1974, an election was conducted at the Belle Ayr Mine, in which Local 1854 emerged victorious. Consequently, on December 9, 1974, Local 1854 was certified as the bargaining representative for the production and maintenance employees at the Charging Party's Belle Ayr Mine.

bargain independently of the Peabody Group, it nonetheless wished to receive the contract extension that had been granted to the employers who comprised the association. As related by Payne, James' response emphasized that, "[U]nless we [Amax] got in the association, we weren't going to get any extension, and that everybody wanted the extension, but nobody wanted to be in the association." James concluded the conversation, however, by stating that, in view of the pending representation case at the Belle Ayr Mine, he would discuss the matter of an extension with the Union's general counsel.

On November 10, 1974, the Union's president, Miller, notified the Charging Party of the following:

> UMWA unilaterally agrees to extend current collective bargaining agreement covering your Belle Ayr Mine to 12:01 a.m. December 12, 1974.

On November 23, 1974, the day after Local 1854's victory in the election at the Belle Ayr Mine, Payne prepared a draft of a letter to Miller, which indicated that after Local 1854's certification by the Board the Charging Party would be prepared to commence negotiations. In addition, the letter stated:

> We have been advised from your office that the U.M.W.A. has offered a further extension of the current agreement to January 12, 1975, provided we participate in bargaining with other companies under a single agent selected by such companies. Solely in order to expedite the negotiation of an agreement, we are *considering participation* in such as arrangement providing our understanding of your proposal, as related to Amax Coal, is correct. [Emphasis supplied.]
>
> * * * * *
>
> If you agree that our understanding is in accord with your proposal, please sign below and return the copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation. Due to the time constraints facing us, your immediate response will be greatly appreciated.

Because he was unable to articulate precisely the Charging Party's concern over the amount of influence that it would exert within the Peabody Group, however, Payne did not mail the letter at that time. Instead, he arranged for a meeting to be held between himself and Joseph Yablonski, the Union's general counsel, on November 25, 1974. Also in attendance at that meeting were the Charging Party's president, Hopper, and Edgar James for the Union. At that meeting, Payne indicated that the Charging Party was reluctant to join the Peabody Group because the voting rights of the members would be determined on the basis of the amount of coal being produced at the time negotiations commenced. Since the Charging Party's production was expected to rise appreciably over the term of the contemplated agreement, it was hesitant to agree to such a system. While the Union's representatives indicated that they perceived the legitimacy of the Charging Party's concern, they expressed the view that the Charging Party would have to resolve this problem with the other members of the association. At the conclusion of the meeting, the Charging Party's representatives indicated that, subsequent to the resolution of this issue, they would notify the Union as to whether they would join the Peabody Group. Immediately following this discussion, the Charging Party mailed the letter referred to above. Subsequent to receiving this letter, Miller signed it as requested and notified the Charging Party by telegram that the Respondents would begin negotiations in mid-December 1974, and that the existing agreement at the Belle Ayr Mine was extended until January 12, 1975.

On or about December 10, 1974, Payne telephoned Yablonski and told him that the Charging Party had been unable to resolve its differences with the Peabody Group and consequently that it intended to bargain independently. During the conversation they agreed to meet on December 17, 1974, in order to discuss this matter further. Shortly after the meeting began on that date, Payne reiterated that the Charging Party intended to negotiate its own contract. In addition, Sonnemann, another of the Charging Party's representatives, stated, in unequivocal

terms, that the Charging Party was not a member of the Peabody Group. The record reveals that Yablonski did not object to either of those statements. The following day, December 18, 1974, Payne wrote a letter to Yablonski, stating, in part:

> In accordance with our discussion in your office on Tuesday, December 17, 1974, we are confirming our tentative understanding with regard to the forthcoming negotiations between Amax Coal Company and the UMWA regarding a wage agreement covering production and maintenance employees at our existing Belle Ayr Mine, Gillette, Wyoming.

Shortly afterward, on December 20, 1974, the Union began negotiations with the Peabody Group. On January 6, 1975, representatives from the Union and the Charging Party met to discuss a comprehensive proposal that the Union had prepared pursuant to its preliminary discussions with the Peabody Group. At that meeting, the parties exchanged proposals and then proceeded to devote the majority of the discussion that followed to a review of the Union's contract proposal. At the conclusion of the meeting, the parties agreed to meet again the following evening.

At the start of the meeting held on January 7, 1975, James Marketti, the Union's director of western organizing, who was not present at the previous meeting, informed the Charging Party's representatives that it was not the Union's intention to negotiate a contract covering solely the Belle Ayr Mine and that the Union was meeting with them for informational purposes only. In this regard, he indicated that, insofar as the Union was concerned, the Charging Party was a member of the Peabody Group. Consequently, he stated that the Union would only negotiate with it as a member of that group and that any agreement entered into between the Union and the Peabody Group would bind the Charging Party. He further indicated that if the Union did not reach an agreement with the Peabody Group by January 12, 1975 (the date the agreement at the Belle Ayr Mine had been extended to), the Union would strike the Charging Party, inasmuch as

the employees would not work without a contract. In addition, he warned Payne, who was the Charging Party's chief representative at this meeting, that "If you don't get into this association, you are going to have problems everywhere. You know how coal miners are." When one of the Charging Party's representatives inquired as to whether this remark was intended as a threat to strike the Charging Party's midwestern mines (which were covered by the National Bituminous Coal Wage Agreement of 1974), Michael Trbovich, another member of the Union's negotiating committee, responded by stating, "Come on, Elkins, you have been in this business for how many years. You know exactly what we are talking about." Finally, at the conclusion of the meeting, when the Charging Party's representatives asked if the Union was refusing to bargain with them, the union negotiators essentially reiterated their views with respect to the Charging Party's membership in the Peabody Group. They did agree, however, to notify Payne the following day regarding the possibility of negotiating separately with the Charging Party.

As promised, the following day the Union responded in the form of a letter written by Yablonski. In that letter, which was delivered to Payne, he indicated that the Union adhered to the position that the Charging Party was a member of the Peabody Group, that its attempt at withdrawal was untimely, and that it would therefore be bound by any agreement that the Union negotiated with the Peabody Group. Payne responded by disputing all of the above-stated assertions.

On the evening of January 11, 1975, the Charging Party attempted to avert the strike that the Union had indicated would occur the following day by delivering a new contract proposal to the Union. Although Yablonski accepted the proposal, he advised the Charging Party's representatives that his acceptance did not "constitute an agreement to bargain separately" and he refused to discuss the proposal at that time. The following day, January 12, 1975, the Union launched a strike against the Charging Party and all the other western coal operators whose employees it rep-

resented. On January 15, 1975, the Union temporarily ceased negotiations with the Peabody Group, but continued meeting with the Pittsburgh and Midway Coal Company, an employer who chose to pursue an individual course of bargaining. Shortly thereafter, on January 18, 1975, Payne sent a telegram to the Union's Western Bargaining Council requesting that separate negotiations between the parties begin no later than January 20, 1975. A reply from the Union was never received. Finally, on February 3, 1975, after being notified that the Board General Counsel intended to issue a complaint in this proceeding, the Union began separate negotiations with the Charging Party.

After a careful review of all the foregoing facts, we find, in agreement with the Administrative Law Judge, that the letter drafted by the Charging Party on November 23, 1974, but not submitted until after the November 25, 1974, meeting with the Union's general counsel, does not indicate the "unequivocal intention to be bound in collective bargaining by group rather than individual action," which the Board requires before it finds that an employer is obligated to accept the results of multiemployer negotiations.[5] On the contrary, we view the above-mentioned letter, as did the Administrative Law Judge, as predicating the Charging Party's participation in the Peabody Group upon the occurrence of two conditions precedent. The first condition was met when Miller signed and returned the Charging Party's letter of November 23, 1974, and thereby confirmed that the Charging Party's perception of the Union's proposal was correct. However, the second condition—that the Charging Party resolve the question of its status within the Peabody Group—was never met, and the Charging Party promptly notified the Union of that fact on December 10, 1975.

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[5] *Custom Color Contractors*, 226 NLRB 851 (1976), enfd. *sub nom. N.L.R.B.* v. *Beckham, Inc.*, 564 F.2d 190 (C.A. 5, 1977); see also *Bill O'Grady Carpet Service, Inc.*, 185 NLRB 587 (1970); *Korner Kafe, Inc.*, 156 NLRB 1157 (1966).

Furthermore, we additionally agree with the Administrative Law Judge's finding that assuming *arguendo*, the Charging Party did, in fact, commit itself to bargain through the Peabody Group, it extricated itself from the obligation to engage in multiemployer bargaining in timely fashion. In arriving at that finding, we note, as did the Administrative Law Judge, that on both December 10 and 17, 1974, the Charging Party's representatives unequivocally expressed its intention to negotiate individually. Within the context of these unambiguous oral assertions, we view the Charging Party's letter of December 18, 1974, which was sent prior to the commencement of the Union's negotiations with the Peabody Group, as constituting "adequate written notice" of withdrawal under the Board's rule in *Retail Associates, Inc.*[6]

After disposing of the threshold question of whether the Charging Party was, in fact, a member of the Peabody Group, the Administrative Law Judge concluded that Miller's letter of November 2, 1974, offering to extend the existing agreement only upon the condition that the Charging Party accede to its request to bargain through a multiemployer association, was an attempt to coerce the Charging Party in its selection of a collective-bargaining representative. Thus, he found the Respondents' conduct violative of Section 8(b)(1)(B) of the Act.[7]

In agreeing with the Administrative Law Judge that the Respondents violated Section 8(b)(1)(B) of the Act by at-

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[6]120 NLRB 388 (1958); see also *The Carvel Company*, 226 NLRB 111 (1976).

[7]The Administrative Law Judge noted that while, on its face, the language contained in Miller's letter does not constitute restraint or coercion within the meaning of Section 8(b)(1)(B), words that are otherwise permissible may have a coercive effect within the context in which they are utilized. See *Local 901, International Brotherhood of Teamsters, etc. [Editorial El Imperial, Inc.]* v. *Raymond J. Compton, Reg. Dir.*, 291 F.2d 793, 797 (C.A. 1, 1961); see also *Dixisteel Buildings, Inc.*, 186 NLRB 393, 395 (1970). Under the circumstances involved in this case, where the Union has a tradition, embodied within its constitution, of engaging in a work stoppage at the expiration of an agreement the Administrative Law Judge viewed the letter as a threat

tempting to coerce the Charging Party in its selection of a collective-bargaining representative, we rely on facts that were found, but not considered by him, and on undenied testimony in the record which, in our view, supports that finding. Specifically, we find persuasive several statements that were made by union representatives at the meeting held on January 7, 1975, and the contents of the letter that Yablonski sent to Payne the following day. As noted above, at the meeting held on that date, Marketti indicated that the Union viewed the Charging Party as a member of the Peabody Group and thus, if the Union did not reach an agreement with that group by January 12, 1975, the Charging Party would be subjected to a strike at its Belle Ayr Mine. In addition, Marketti's statement—"If you don't get into this association, you will have problems everywhere . . . ."—when considered in the context of Trbovich's remarks, can reasonably be interpreted as a threat to strike the Charging Party's midwestern mines, for which an agreement had already been reached. While Yablonski's letter of January 8, 1975, does not contain any explicit references to a strike, by reiterating that the Union considered the Charging Party to be a member of the Peabody Group and expected it to be bound by any agreement that was reached with that group, it is clear that the letter fostered the impression that the Union sanctioned the statements made by its representatives the previous day.

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to strike the Charging Party immediately upon the termination of the then-existing agreement, unless the Charging Party agreed to bargain through the Peabody Group.

In addition, the Administrative Law Judge found that the 30-day contract extension granted to the Charging Party on November 10, 1974, was insufficient to cure the effects of the above threat. He concluded that the above-noted statements of Edgar James, in a telephone conversation with Payne, immediately prior to the granting of the extension, were "reasonably calculated to lead Amax to believe that the reason its current agreement was extended 30 days was related to the question concerning representation caused by the election petition and that otherwise its failure to join the Peabody Group would have resulted in an immediate strike."

In our opinion, when these additional facts are considered in conjunction with the Union's letter of November 2, 1974, it is evident that the Union sought to dictate to Amax who its collective-bargaining representative would be. Under the circumstances present herein, we feel that the Union's course of conduct "was designed to exert some restraint or coercion . . . over and above a mere attempt at persuasion in a free market place of ideas."[8] Indeed, by attempting to compel the Charging Party to relinquish its right to negotiate independently and instead negotiate through a multiemployer association, the Union engaged in a classic example of the type of conduct which Congress sought to proscribe in enacting Section 8(b)(1)(B) of the Act.[9] Accordingly, on the basis of all of the foregoing, we find, in agreement with the Administrative Law Judge, that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party unless it agreed to bargain through the Peabody Group.

However, contrary to the Administrative Law Judge, we also find that from January 12 to February 3, 1975, the Respondents' strike was motivated *inter alia*, by a desire to compel the Charging Party to bargain as a member of the Peabody Group and, therefore, violated Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act.[10] In arriving

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[8] *Sheet Metal Workers International Association, Local Union No. 59*, 227 NLRB 520 (1976); *International Ladies' Garment Workers' Union, AFL—CIO, et al. (Slate Belt Apparel Contractors Association, Inc.)*, 122 NLRB 1390 (1959), enforcement denied 274 F.2d 376 (C.A. 3, 1960); *Paddock Pools of California, Inc. et al.*, 120 NLRB 249 (1958).

[9] In explaining this Section, Senator Taft stated: "Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' " II Leg. Hist. 1012 (1947).

[10] In pertinent part Sec. 8(b)(4)(i) and (ii)(A) of the Act provides: "(b) It shall be an unfair labor practice for a labor organization or its agents—(4)(1) to engage in . . . a strike . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is: (A) forcing or requiring any employer . . . to join any . . . employer organization . . . ."

at this finding, we view the strike as being, at least in part, a culmination of the unlawful conduct we have fully detailed above. In this regard, we rely principally upon the fact that on January 7, 1975, a union representative informed the Charging Party that it was required to negotiate as a member of the Peabody Group and that it would be subjected to a strike on January 12, if, prior to that time, the Union had not reached an accord with the negotiators for the Peabody Group. In addition, we also rely on the fact that on January 11, 1975, the day prior to the threatened strike, the Union persisted in its refusal to negotiate separately with the Charging Party and continued to insist that it negotiate through the Peabody Group. Thus, the Charging Party was placed in a position whereby, although it was faced with the threat of an impending strike, it was nevertheless precluded from bargaining with the Union. It is clear, then, that the only way the Charging Party could have hoped to have any input into averting, or limiting the duration of, the strike would have been to waive its statutory right to select its own bargaining representative and acquiesce in the Union's demand to bargain through the Peabody Group.

Unlike the Administrative Law Judge, we also find that the Union's conduct subsequent to the commencement of the strike serves to establish the existence of a proscribed objective.[11] In this connection, we note that on January 18, 1975, the Charging Party submitted yet another request for negotiations regarding the Belle Ayr Mine, to which the Union failed to respond. We view such conduct in light of the fact that on January 15, 1975, the Union suspended negotiations with the Peabody Group,

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[11] See *Glass Workers Local 1892, Brotherhood of Painters, Paperhangers, and Decorators of America, AFL—CIO (Frank J. Rooney, Inc.)*, 141 NLRB 107 (1963), where, in finding a violation of Sec. 8(b)(4)(A) of the Act, the Board reaffirmed the principle first stated in *International Ladies' Garment Workers' Union, AFL—CIO (Coed Collar Company)*, 137 NLRB 1698 (1962), that "Unlawful motivation in picketing situations, as intent in discharge cases . . . must be ascertained from the context of preceding and subsequent as well as attendant circumstances."

citing the slight progress that had been made up until that point, but nonetheless continued to meet with Pittsburgh and Midway Coal Company, another employer who, like the Charging Party, had elected to pursue independent negotiations. Thus, despite the fact that negotiations were stalled with the Peabody Group and even though the Union was continuing its efforts to reach an agreement with another employer which was not a member of the Peabody Group, it nevertheless refused to acknowledge the Charging Party's request to bargain. Under these circumstances, the only inference to be drawn from the Union's conduct is that, during this period, it was continuing its effort to compel the Charging Party to bargain through the Peabody Group. Finally, we note that it was only after learning that a complaint was about to issue in this proceeding that the Union began independent negotiations with the Charging Party on February 3, 1975.

It is, of course, true that by launching a strike against all of the western coal operators at the expiration of their existing agreements, the Union was motivated by entirely lawful economic considerations. However, insofar as the strike against the Charging Party was concerned, we are persuaded that the foregoing evidence convincingly demonstrates that it was also motivated by the Union's desire to compel the Charging Party to bargain through the Peabody Group. The fact that one of the objectives of the strike was lawful does not, in any way, diminish the fact that the other objective was unlawful.[12] Accordingly, we find that, from January 12, 1975, to February 3, 1975, the Respondents struck the Charging Party with the objective of forcing it to engage in multiemployer bargaining and, therefore, violated Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act.[13]

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[12] *International Longshoremen's and Warehousemen's Union, Local 8; International Longshoremen's and Warehousemen's Union, Local 92; and International Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 126 NLRB 172 (1960).

[13] We agree with the finding made by the Administrative Law Judge in sec. III,C,6, on his Decision that the Respondents also violated Sec.

2. The General Counsel and the Charging Party also allege that the Respondents' conduct in insisting to impasse and striking to obtain the Charging Party's participation in the Union's pension and welfare trust funds (hereinafter referred to as the trust funds), the management trustee of which is not selected by the Charging Party, is action constituting coercion in the selection of a representative for the purposes of collective bargaining in violation of Section 8(b)(1)(B) and 8(b)(3) of the Act. The Administrative Law Judge concluded, however, that the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act and, therefore, dismissed that portion of the complaint. We agree with the Administrative Law Judge.

The relevant facts, which are fully set forth in the Administrative Law Judge's Decision, may be briefly summarized as follows:

The trust funds are jointly administered, multiemployer trusts, established pursuant to the dictates of Section 302(c)(5) of the Labor-Management Relations Act. In order to comply with the "equal representation" requirement of that Section, the trust funds are administered by three trustees, one appointed by the Union, one appointed by the participating employers, and a neutral trustee selected by the two other trustees. The provisions of the Union's 1974 "Benefit Plan and Trust" defines the trustees as fiduciaries within the meaning of the Employee Retirement Income Security Act of 1974. In addition, the benefit plan clearly delineates the major eligibility requirements for each category of beneficiaries, the benefit level, and the amount of employer contributions that are to be allocated to the various classes of beneficiaries. Notwithstanding those limits on their authority, however, the trustees are empowered to, *inter alia*: (1) provide health benefits to any participant who is also receiving pension

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8(b)(3) of the Act by refusing to meet and bargain with the Charging Party, but conclude that the evidence shows that this violation occurred from approximately January 7 to February 3, 1975, and not from December 18, 1974, to February 3, 1975, as found by him.

benefits and who "is not earning more than an amount to be determined by the trustees"; (2) render a final determination as to all issues concerning eligibility for pension benefits; (3) in the event the assets of the 1974 benefit trust become insufficient to pay the scheduled benefits, suspend or reduce the benefits to a level which, in their judgment, can be borne by the assets of said trust; and (4) "determine whether employers have violated their contractual obligations and, if so, to pursue legal remedies on behalf of the beneficiaries."

Within his Decision, the Administrative Law Judge noted initially that the Union's proposal regarding the trust funds, inasmuch as it seeks to require the Charging Party to contribute funds into a health and retirement program for its employees, is undisputably a mandatory subject of bargaining. Then, as noted above, he rejected the contention that, notwithstanding the mandatory nature of the proposal, the Charging Party is immune from economic pressure directed at compelling its participation in the trust funds on the ground that the trustees are collective-bargaining representatives within the meaning of the Act. In so doing, he relied, not only upon the fiduciary obligations imposed on the trustees by the Employee Retirement Income Security Act, but also upon several decisions rendered by various Federal courts, all of which suggest that the trustees of a trust fund established pursuant to Section 302(c)(5) do not possess the attributes of a collective-bargaining representative.

Following the issuance of the Administrative Law Judge's Decision in this case, the Board issued its Decision in *Sheet Metal Workers' International Association and Edward J. Carlough (Central Florida Sheetmetal Contractors Association, Inc.)*.[14] In that case, after carefully considering many of the same principles discussed by the Administrative Law Judge herein, the Board concluded that the trustees of a jointly administered, multiemployer trust fund are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan, and are not, therefore,

[14] 234 NLRB No. 162 (1978).

collective-bargaining representatives within the meaning of Section 8(b)(1)(B) of the Act. Accordingly, insofar as it is consistent with our Decision in *Central Florida, supra*, we adopt the Administrative Law Judge's finding herein that the Respondents did not violate Section 8(b)(1)(B) and 8(b)(3) of the Act by insisting to impasse and striking to obtain the Charging Party's participation in the trust funds, which, of necessity, required it to accept a preselected management trustee as its representative in the funds' administration.[15] We shall dismiss, therefore, this portion of the complaint.

3. The General Counsel and the Charging Party further contend that the Respondents violated Section 8(b)(3) of the Act by insisting to impasse upon the "Enabling" and "Application of this Contract to the Employer's Coal Lands" clauses, which they allege to be nonmandatory subjects of bargaining. The Administrative Law Judge concluded that both clauses are, in fact, nonmandatory subjects of bargaining, since, in his view, they seek to require the Charging Party to bargain "on a basis broader

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[15] In adopting the Administrative Law Judge's findings, we do not adopt his analysis of the Board's decisions in *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977); *L & M Carpet Contractors, Inc.*, 218 NLRB 802 (1975); *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL—CIO, et al. (Fixtures Unlimited)*, 213 NLRB 363 (1974), enfd. in part, reversed in relevant part, and modified in part 531 F.2d 424 (C.A. 9, 1976); and *Local 80, Sheet Metal Workers International Association, AFL—CIO, et al. (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966).

In all of the above cases, the Board has found the trustees of a trust fund which has been established by a collective-bargaining agreement to be the agents of each of the parties to the collective-bargaining agreement.

The Administrative Law Judge viewed those decisions as implicitly indicating the Board's recognition that the trustees cannot possibly act as the collective-bargaining representatives of their appointing parties in administering such a trust fund. However, the issue of the trustees' status as they perform their "discretionary functions in the internal administration of the trust" was not before the Board in those cases and, consequently, we do not rely on them in reaching our decision herein. See *Central Florida, supra* at fn. 30.

than the certified unit." Accordingly, he found that Respondents had violated the Act as alleged. For the reasons expressed hereinafter, we disagree with the findings and conclusions of the Administrative Law Judge.

Briefly, the facts with respect to this issue may be summarized as follows:

On January 6, 1975, the Union included the following two clauses as part of its initial proposal:

> Article I, Enabling Clause
>
> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].
>
> Article II, Application of this Contract to the Employer's Coal Lands.
>
> (f) . . . this agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

At the meeting held on the above date, the Charging Party's representatives objected to both of these clauses on the ground that they encompassed facilities other than the Belle Ayr Mine. In response to these objections, Yablonski, on January 9, 1975, sent a letter to the Charging Party stating, "Your assertion that the UMWA has attempted to bargain for Amax operations other than Belle Ayr is plainly without foundation. The standard UMWA accretion clauses—known as 'Application of contract to coal lands'—merely commits an employer who agrees to it to apply the terms of that agreement to any new mining operations which may be developed during the life of the agreement and the UMWA is either recognized or certified as the collective bargaining representative of that operation." Thereafter, on July 1, 1975, the Union formalized this interpretation by amending the enabling clause to indicate that the agreement was intended to cover other subbituminous or lignite mines owned or operated by the Charging Party "provided that the UMWA is

the bargaining representative of the employees at such mines." Similarly, the "Application of this Contract to the Employer's Coal Lands" clause (hereinafter referred to as the application-of-contract clause or the coal lands clause) was amended to provide that the agreement was to be applied only to mines "at which the UMWA is established as the bargaining representative for the employees." Finally, on November 14, 1975, in the face of the Charging Party's adamant objection to both clauses, the Union deleted the application-of-contract clause and modified the enabling clause so that it clearly applied to only the Belle Ayr Mine. However, in doing so, the Union took the position that the Belle Ayr Mine encompassed all mining that would be undertaken by the Charging Party on its present leases in Campbell County, Wyoming, which at the time of the hearing amounted to several thousand acres.

The Administrative Law Judge viewed the two above-stated proposals as "after acquired or additional facility" clauses, similar to the one involved in *Houston Division of the Kroger Co.*[16] While acknowledging that, in light of the Board's Decision in *Kroger, supra*, such a clause is a valid contractual provision which the parties may voluntarily include in an agreement, he nevertheless concluded that both clauses involved in the instant proceeding are nonmandatory subjects of bargaining. This conclusion was predicated on his determination that the Respondents' objective in demanding the two disputed proposals was to merge the existing unit into an employerwide unit. In the Administrative Law Judge's view, the integrity of the bargaining unit precluded his finding that a contract proposal seeking the enlargement of an existing unit was a mandatory subject of bargaining.

As indicated in footnote 2 above, subsequent to the issuance of the Administrative Law Judge's Decision in this case, the Board issued its Decision in *United Mine Workers of America (Lone Star Steel Company and Surface Industries, Inc.), supra*. In that case, the Board interpreted the application-of-contract clause as constituting a

[16] 219 NLRB 388 (1975).

mandatory subject of bargaining. In applying the principles expressed in *Lone Star Steel Company* to the instant proceeding, we note initially that in the former case the Board held, contrary to the finding of the Administrative Law Judge herein, that "certain 'after acquired' clauses, which involve individuals outside the employment relationship, vitally affect the interests of bargaining unit employees and therefore constitute mandatory subjects of bargaining." Beyond this fundamental disagreement with the Administrative Law Judge over the nature of after-acquired clauses, however, we are also of the opinion that he has misperceived the manner in which the two clauses involved in this proceeding are designed to operate.

In the instant case, as in *Lone Star Steel Company*, the application-of-contract clause does not anticipate extending the terms of a collective-bargaining agreement to newly acquired facilities by adding them to the existing bargaining unit, as was the case in *Kroger*, *supra*.[17] Instead, consistent with the Board's Decision in *Lone Star Steel Company*, we view the two disputed proposals as seeking a contractual commitment by the Charging Party to apply the proposed agreement in its entirety to new mining or coal preparation operations that are concededly outside the scope of the existing unit, provided, of course, that the Union, either through voluntary recognition or Board certification, becomes the bargaining representative of the employees at the new facility. Thus, unlike the Administrative Law Judge, we do not view this clause as purporting to expand the existing unit by absorbing the employees at a new operation. For example, if the Charging Party were to commence mining operations on land that is covered by the disputed proposals, those operations may or may not be an accretion to, or an expansion of, the existing unit. The disputed proposals, however, do not address themselves to the solution of that problem. Rather the question of whether the new operation may be prop-

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[17] After carefully examining their provisions, we find, for the purposes of this Decision, that both the enabling clause and the application-of-contract clause have the same effect.

erly made a part of the existing bargaining unit would be subject to the Board's ultimate authority to establish an appropriate unit, and any agreement reached between the parties which did not comport with Board policy would be unenforceable where, as here, a Board certification is involved.[18]

In view of the foregoing, we conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by the Charging Party during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees at the Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company*, both clauses serve to "remov[e] the economic incentive which might otherwise encourage [the Charging Party] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining. Accordingly, we find that the Respondents did not violate Section 8(b)(3) of the Act by insisting to impasse and striking to obtain the inclusion of the enabling clause and the application-of-contract clause in any collective-bargaining agreement reached herein. We shall therefore dismiss this portion of the complaint.[19]

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[18] *Kroger*, *supra* at fn. 6.

[19] In finding that the Union did not violate Sec. 8(b)(3) of the Act by bargaining to impasse over the application-of-contract and enabling clauses, Member Penello does not mean to intimate that he no longer adheres to his dissenting opinion in *Houston Division of the Kroger Co.*, *supra*. In *Kroger*, the respondent had separate collective-bargaining agreements with two different unions. Each agreement contained a clause whereby the respondent agreed to recognize the union as the exclusive bargaining representative of employees in designated classifications at all the respondent's stores in its Houston division. When the respondent shifted two stores into the Houston division for administrative reasons, the unions demanded recognition, and,

Amended Conclusions of Law

1. Substitute the following for Conclusions of Law 4, 5, 6, and 7:

"4. United Mine Workers of America, Local No. 1854, has been, at all times material herein, the exclusive representative of the employees in the aforesaid unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

"5. By engaging in a strike for the purpose of forcing Amax to enter into a collective-bargaining agreement containing the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair

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although their claims were based on their respective contracts, both unions offered to submit proof-of-majority status on the basis of authorization cards. The respondent rejected, however, both the claim for recognition under the existing agreement and the offer to prove majority status on the basis of cards.

In dissenting from the Board's finding that the respondent violated Sec. 8(a)(5) of the Act under the above circumstances, Member Penello expressed the view that since the unions possessed a card majority, the respondent could have voluntarily recognized the unions, but that it was not required to recognize them under the terms of the additional store clause. Rather, since the clause did not provide any method for determining union majority, and, in fact, omitted any reference to majority support, the respondent was not precluded from petitioning the Board for an election when confronted with the unions' demand for recognition. See *Linden Lumber Division, Summer & Co.* v. *N.L.R.B.*, 419 U.S. 301 (1974).

In the instant case, as the Union's letter of January 9 clearly indicates, both the application-of-contract and enabling clauses were to become operative only if the Union was either recognized by the Employer or certified by the Board Thus, the objections that Member Penello had with respect to the clauses in *Kroger* are not present in this case. Accordingly, he joins with his colleagues in finding the two clauses involved herein constitute mandatory subjects of bargaining on which the Union could lawfully bargain to impasse.

labor practices within the meaning of Section 8(b)(3) of the Act.

"6. By engaging in a strike and picketing with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

"7. By insisting to the point of impasse that Amax accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act."

2. Delete Conclusion of Law 8 and renumber the subsequent paragraphs accordingly.

3. Insert the following immediately after renumbered Conclusion of Law 10:

"11. By striking to compel Amax to bargain through a multiemployer association, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, United Mine Workers of America, Washington, D.C., and United Mine Workers of America, Local 1854, Gillette, Wyoming, their officers,

agents, and representatives, shall take the action set forth in said recommended Order, as so modified.

1. Insert the following after paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(d) Engaging in, calling or causing the employees in the appropriate unit described herein above to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association."

2. Substitute the following for renumbered paragraphs 1(f), (g), (h), and (i).

"(f) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

"(g) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the bargaining unit described hereinabove.

"(h) Inducing or encouraging any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with

its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses, which are prohibited by Section 8(e) of the Act.

"(i) Restraining or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 29, 1978

JOHN H. FANNING,
Chairman

HOWARD JENKINS, JR.,
Member

JOHN A. PENELLO,
Member

BETTY SOUTHARD MURPHY,
Member

JOHN C. TRUESDALE,
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between United Mine Workers of America, Local No. 1854, and United Mine Workers of America, and the Company, involving the bargaining unit described below, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act. The bargaining unit is:

> All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT engage in, call, or cause the employees in the appropriate unit described above to engage in, a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

WE WILL NOT restrain or coerce the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described above.

WE WILL NOT engage in, call, or cause the employees in the aforesaid appropriate unit to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

WE WILL NOT refuse to bargain collectively by failing and refusing to meet with Amax Coal Company for the

purpose of negotiating a collective-bargaining agreement covering the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the aforestated bargaining unit.

WE WILL NOT induce or encourage any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses which are prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

Case Nos. 27-CB-900
27-CC-571

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

and

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

Table of Contents

	Page
DECISION	1
Statement of the Case	1
Findings of Fact	2
I. The Business of the Employer Involved	2
II. The Labor Organization Involved	2
III. The Alleged Unfair Labor Practices	2
A. *The Issues in Perspective*	2
B. *The Facts: A Chronology*	5
1. The events from September 1974 until January 6, 1975	5
2. The meeting of January 6, 1975	10
3. The meeting of January 7, 1975	11
4. The events between January 8, 1975 and February 3, 1975	13
5. The meetings of February 3, 5 and 6, 1975	14
6. The events between February 5 and February 13, 1975	16
7. The meetings of February 13, 14, 15, 17 and 18, 1975.	17
8. The events between February 18 and February 26, 1975	20
9. The meeting of February 26, 1975	21
10. The meeting of March 4, 1975	23

	Page
11. The meeting of March 7, 1975	23
12. The meeting of March 14, 1975	24
13. The events between March 14, 1975 and May 28, 1975	25
14. The meeting of May 28, 1975	26
15. The meeting of June 16, 1975	27
16. The events between June 16, 1975 and July 21, 1975	28
17. The meetings of July 21 and July 22, 1975	30
18. The July 22, 1975 stockholders meeting .	31
19. The meetings of August 7 and 8, 1975 ...	31
20. The events between August 8, 1975 and October 9, 1975	33
21. The meeting of October 9, 1975	33
22. The meetings of October 21–22, 1975	34
23. The UMWA contract proposal of November 14, 1975	35
24. The meeting of November 26, 1975.....	35
25. The meetings of December 7–8, 1975	35
26. The events between December 8, 1975 and February 17, 1976	36
27. The meetings of February 17–18, 1976 ..	36
28. The events from February 18, 1975 to the date of the hearing.....	36
C. *Discussion and Ultimate Findings*	36
1. The failure to comply with Section 8(d)(3) of the Act	36
2. Amax's membership or nonmembership in the Peabody	39
Group and if Amax did not join this group, did the UMWA engage in coercive conduct designed to compel Amax to designate the Peabody Group as its representative for the purposes of collective bargaining	
a. *Amax's membership or nonmembership in the* ..... *Peabody Group*	39

Page

b. *The alleged coercive conduct designed to compel* 41
Amax to designate the Peabody Group as its collective-bargaining representative
c. *The alleged strike to compel Amax to join the Peabody Group* 42

3. The contrast proposals which allegedly require Amax to select another employer as its representative for purposes of collective bargaining 43
a. *The UMWA health and retirement funds* 43
b. *The Joint Western Surface Mining Industry Training Committee* 53
c. *The district agreements* 57

4. The contract proposals which allegedly contain nonmandatory bargaining subjects 58
a. *The "coal lands clause" and "enabling clause"* 58
b. *The dismissal of litigation proposal* . 64
c. *The exemptions clause; the 1950 pension trust; the exclusion of Local 1854* 66

5. The contract proposals which allegedly violate Section 8(e) of the Act 68
a. *The "successorship clause"* 68
b. *The "leasing-licensing out clause"* ... 72
c. *The "coal transportation clause"* 77
d. *The "repair and maintenance work clause"* 80
e. *The construction clause* 83
f. *Work jurisdiction clause* 87

6. The alleged refusal to meet and bargain .. 88
7. The alleged overall failure to bargain in good faith 90
a. *The applicable principles of law* 90

Page

b. *The UMWA's alleged failure to bargain in good faith* 91
c. *Amax's alleged failure to bargain in good faith* 98
8. The responsibility of Local 1854 for the unfair labor practices committed by the UMWA 102
The Remedy 102
Conclusions of Law 103
ORDER 104
APPENDIX

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES BRANCH OFFICE SAN FRANCISCO, CALIFORNIA

Case Nos. 27-CB-900
27-CC-571

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

and

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

Daniel C. Ferguson for the General Counsel.

Daniel F. Gruender and *Francis F. Sulley (Shimmel, Hill, Bishop & Gruender)* for the Charging Party.

Harrison Combs, Richard M. Bank, Ellen P. Chapnick and *Edward J. Scheuneman* for the Respondents.

DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this consolidated proceeding which was held on various dates in June and July 1976 was based upon unfair labor practice charges filed by Amax Coal Company, a Division of Amax, Inc., herein called Amax, and an amended consolidated complaint issued on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Board, Region 27, alleging that Respondents United Mine Workers of America, Local No. 1854, herein called Local 1854, and United Mine Workers of America, herein called UMWA, have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B), 8(b)(3) and 8(b)(4)(i),(ii)(A) of the National Labor Relations Act, as

amended, herein called the Act.[1] Respondents filed an answer and an amended answer denying the commission of the alleged unfair labor practices.

Upon the entire record,[2] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

Findings of Fact

I. THE BUSINESS OF THE EMPLOYER INVOLVED

The Charging Party, Amax, is a division of Amax, Inc., a New York corporation with its principal office located in Indianapolis, Indiana. Amax is in the business of mining coal in the States of Indiana, Illinois, Kentucky and Wyoming. Its facility involved in this proceeding is the Belle Ayr Mine located in the vicinity of Gillette, Wyoming, from which Amax annually ships coal valued over $50,000 to points outside the State of Wyoming.

Based on the foregoing, I find that Amax is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act for the Board to assert its jurisdiction over this dispute.

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[1] The initial charge in Case No. 27-CB-900 was filed January 8, 1975, and was amended in 1975 on January 14, April 23 and July 3. The initial charge in Case No. 27-CC-571 was filed January 27, 1975, and amended July 3, 1975. A complaint issued on February 14, 1975, in Case No. 27-CB-900 and on April 22, 1975, in Case No. 27-CC-571. These cases were consolidated for hearing on February 12, 1976, on which date an amended consolidated complaint issued. The amended consolidated complaint was further amended on March 25, 1976, and again during the course of the hearing. The amended consolidated complaint encompassed Amax's charges filed in Case No. 27-CB-941 alleging that Respondents violated Section 8(b)(1)(A) of the Act. The parties at the start of the hearing, with my approval, entered into a settlement which disposed of the matters covered by Case No. 27-CB-941.

[2] The Charging Party's unopposed Motion to Correct Transcript is granted.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted that Respondents United Mine Workers of America and United Mine Workers of America, Local No. 1854, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues in Perspective*

The UMWA, which represents employees employed in the coal mining industry, is one of the country's largest industrial unions. Amax, the second largest coal producer in the Western United States and the largest in the United States, operates coal mines in Illinois, Indiana, Kentucky and Wyoming. The mine involved here is its Belle Ayr Mine located in Wyoming. It is a surface mine which produces sub-bituminous coal whereas Amax's midwestern mines produce bituminous coal.

Amax's miners are represented by the UMWA. Those employed at the Belle Ayr Mine were covered by the terms of a collective-bargaining agreement effective from November 12, 1971 until November 12, 1974. The agreement covered only the miners employed at the Belle Ayr Mine. In all respects, except for one described *infra*, the agreement was identical to the National Bituminous Coal Wage Agreement of 1971 negotiated between the UMWA and the Bituminous Coal Operators Association, herein the BCOA. The national Bituminous Coal Wage Agreement covered Amax's midwestern mines by virtue of its membership in the BCOA.

The UMWA in the recent past has negotiated with an object of securing a uniform collective-bargaining agreement for the entire industry. Since the 1950's virtually all of the Nation's bituminous mines whose employees are represented by the UMWA have executed the National Bituminous Coal Wage Agreement. The UMWA's bargaining strategy was to reach agreement with the BCOA and then have the producers of bituminous coal who were

not represented by the BCOA sign the agreement without change. The employers who operate surface sub-bituminous and lignite mines in the Western United States, whose employees are represented by the UMWA, were also expected, since at least 1964, to execute *pro forma* the National Bituminous Coal Wage Agreement for their mines.[3] And, as a matter of fact, the contracts between the UMWA and the western sub-bituminous coal operators, including Amax's, were identical to the National Bituminous Coal Wage Agreement.

Normally when the aforesaid western agreements and the National Bituminous Coal Wage Agreement terminated, the UMWA would negotiate a new agreement with the BCOA and then present this agreement to the western operators for their execution. In 1974, however, the UMWA decided to change this policy. Instead of automatically extending the terms of the National Bituminous Coal Wage Agreement to cover the western mines, the UMWA decided to negotiate a Western Sub-Bituminous Coal Wage Agreement with the western operators. The UMWA contemplated that the Western Agreement would incorporate the language of the National Bituminous Coal Wage Agreement insofar as the language applied to sub-bituminous surface mining but, to meet the needs of the western surface miners and their employers, would otherwise deviate from its language. It was contemplated by the UMWA that the portions of the National Bituminous Coal Wage Agreement dealing with wages, hours, job classifications and health and retirement fund contributions, among others, would be changed for the Western Agreement. Also, the UMWA in November 1974, at about the time of the termination of the existing agreements, requested that the employers who operate sub-bituminous surface mines in the west, whose employees were represented by the UMWA, designate a single bargaining rep-

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[3] The sole deviation from the terms of the National Bituminous Coal Wage Agreement contained in the separate agreements executed by the western sub-bituminous coal producers was a lower per ton contractual health and retirement fund contribution.

resentative to negotiate a Western Sub-bituminous Coal Wage Agreement. Several of the western operators agreed to do this and designated one employer representative to bargain with the UMWA on their behalf. The so-called Peabody Group. The UMWA takes the position that Amax was one of the employers that joined the Peabody Group. Amax disputes this.

Amax's separate contract with the UMWA covering its one western mine, the Belle Ayr Mine, was scheduled to terminate on November 12, 1974, along with the UMWA's other western agreements and the National Bituminous Coal Wage Agreement. The UMWA entered into contract negotiations for new agreements with the BCOA, the Peabody Group, and three or four employers, including Amax, who operated mines in the west. By the time of the hearing in this case, June-July 1976, the UMWA had reached agreement with all of the above employer associations and employers except Amax. On January 12, 1975, the UMWA struck the Belle Ayr Mine, causing it to cease operation until March 1975. The strike still continues.

The amended consolidated complaint in substance alleges that the UMWA and Local 1854, the Respondents, violated Section 8(b)(1)(B), 8(b)(4)(A) and 8(b)(3) of the Act, as follows:

8(b)(1)(B)—Adamantly insisting that Amax agree to contractual provisions providing for the designation of persons not selected by Amax to administer a training program and a pension, health and retirement program, and by threatening to strike and by engaging in a strike to require Amax to bargain through a multiemployer bargaining association.

8(b)(4)(A)—Engaging in a strike for an object of requiring Amax to join and be represented by a multiemployer bargaining association and for a further purpose of requiring Amax to enter into several contractual provisions prohibited by Section 8(e) of the Act.

8(b)(3)—Striking in support of its contract demands without complying with the notice requirements of Section 8(d)(3) of the Act; striking to require Amax to bargain

through a multiemployer bargaining association; refusing to meet and negotiate with Amax from January 6, 1975 until on or about February 3, 1975; insisting to the point of impasse that Amax accept contractual provisions which are nonmandatory subjects of bargaining and accept other contractual provisions which are proscribed by Section 8(e) of the Act; and engaging in overall bad-faith bargaining.

B. *The Facts: A Chronology*

1. The events from September 1974 until January 6, 1975

The UMWA's collective-bargaining agreements pertinent to this case—the agreements covering the subbituminous and lignite mines in the west and the National Bituminous Coal Wage Agreement covering the employermembers of the BCOA and the independent operators who operate bituminous mines in the midwest—were scheduled to terminate at 12:01 a.m., November 12, 1974, upon written notification of termination given by either party at least 60 days prior to the date of the termination. The UMWA on September 10, 1974, gave timely notice of termination to all of the parties, including Amax, who were bound by the aforesaid agreements.

On September 12, 1974, in Case No. 27-RC-4914, the International Union of Progressive Mine Workers of America filed a representation petition with the Board seeking to represent the miners employed at the Belle Ayr Mine. Thereafter, Local 1854 intervened in that proceeding.

On September 18, 1974, Amax's president, Hollie Hopper, wrote UMWA President Arnold Miller that the representation petition filed with the Board by the Progressive Mine Workers raised a question concerning the representation of the Belle Ayr Mine which had to be resolved by the Board before the parties could negotiate the terms of a new agreement.

On November 2, 1974, UMWA President Miller, by identical letters, notified each one of the approximately 12

employers, including Amax, who operate coal mines in the west, who were signatory to agreements covering these mines with the UMWA, that the UMWA for the past 2 months had been engaged in negotiations with the BCOA for a successor agreement to the National Bituminous Coal Wage Agreement of 1971 and went on to propose that the 12 employers engage in multiemployer bargaining with the UMWA for their western sub-bituminous and lignite mines and stated if they agreed to this proposal, the UMWA would extend their present agreements for a period of 60 days beyond the November 12, 1974 termination date. The letter in pertinent part reads:

> The Union's belief is that it has already been engaged in multiemployer bargaining as a practical matter with the various sub-bituminous and lignite signatories, and proposes to formalize the practice by executing a single successor Sub-bituminous and Lignite Agreement with an association of sub-bituminous and lignite employers rather than continuing the past practice of executing formally separate contracts with each employer.
>
> Contingent upon your assent to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974.

Of the several western coal producers who were signatories to contracts, four—Energy Fuels Corporation, Kemmerer Coal Company, Usibelli Coal Mine, Inc. and The Peabody Coal Company, herein collectively called the Peabody Group—agreed to engage in multiemployer bargaining provided that each company execute a separate agreement. In return the UMWA granted to each one a 60-day extension of their existing collective-bargaining agreements. Amax, along with some of the other western coal producers, under contract with the UMWA, rejected the UMWA's offer. Specifically, on November 6, 1974, Amax's president, Hopper, wrote UMWA's president, Miller, acknowledging the receipt of Miller's letter of November 2 and took the position that the representation petition filed with the Board by the Progressive Mine

Workers prohibited Amax from lawfully engaging in collective bargaining with the Union for a new contract covering the Belle Ayr Mine, and it would have to await the Board's resolution of the representation case before taking any action about the pending contract negotiations.

Thereafter, during November 1974, Elkins Payne, Amax's vice president of administration and employee relations, phoned Ed James, an assistant to UMWA's president, Miller, and reiterated to James the position taken in Hopper's November 6 letter to Miller. In addition, Payne indicated that Amax preferred to bargain independently for the Belle Ayr Mine rather than through the Peabody Group and asked whether Amax would be granted the 60-day contract extension even though it wanted to bargain independently. James answered that unless Amax joined the Association it would not get any extension of its contract but, in view of the pending representation case at the Belle Ayr Mine, he would consider and discuss the matter with the UMWA's General Counsel.

On November 10, 1974, by mailgram, UMWA's president, Miller, notified Amax: "UMWA unilaterally agrees to extend current collective bargaining agreement covering your Belle Ayr Mine to 12:01 a.m., December 12, 1974."

On November 22, 1974, an election was conducted by the Board at the Belle Ayr Mine which was won by Local 1854.[4]

On November 23, 1974, Payne *drafted* a letter to UMWA's president, Miller, which stated in substance that Amax, upon the certification of Local 1854, was prepared to begin collective-bargaining negotiations immediately. The letter goes on to state:

> We have been advised from your office that the U.M.W.A. has offered a further extension of the current agreement to January 12, 1975, provided we participate in bargaining with other companies under a

[4]Local 1854 was certified by the Board on December 9, 1974, as the exclusive bargaining representative of the production and maintenance employees employed at the Belle Ayr Mine.

single agent selected by such companies. Solely in order to expedite the negotiation of an agreement, we are considering participation in such an arrangement providing our understanding of your proposal, as related to Amax Coal, is correct.

Based upon conversations with representatives from your office and other interested parties, our understanding of the proposal is as follows:

1. Bargaining will begin in late November and existing agreements for participants will be extended to January 12, 1975.
2. Assuming successful negotiations, any agreement reached will cover only the existing Belle Ayr Mine bargaining unit and will be executed individually for that mine:
3. Participation in bargaining in this instance does not constitute a waiver of rights to bargain independently in the future.

If you agree that our understanding is in accord with your proposal, please sign below and return the copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation. Due to the time constraints facing us, your immediate response will be greatly appreciated.

Payne did not mail this letter because of a concern which he was unable to satisfactorily reduce to writing, namely, his concern about Amax's role in the bargaining. In view of this Payne arranged to meet on November 25, 1974, with UMWA's general counsel, Yablonski. Amax's president, Hopper, and Ed James, an assistant to UMWA's president, Miller, also were present at this meeting. Payne reviewed the three points set forth in his November 23 letter and also told Yablonski and James that Amax was reluctant to join the Peabody Group because it was Amax's understanding that the votes of the members of the group would be weighed in accordance with tons of coal produced which was not fair, since Amax, although presently only producing about half a million tons at the

Belle Ayr Mine, toward the end of the term of the contract would be producing close to 20 million tons. The UMWA officials indicated this was a problem Amax would have to work out with the members of the Peabody Group. The meeting concluded with Amax's representatives stating that when the company resolved its problems, it would notify the UMWA whether or not it had decided to join the Peabody Group. Then, Payne and Hopper visited their lawyer's office where they reviewed their discussion with Yablonski and James and mailed the letter of November 23, *supra*, drafted by Payne which was now signed by Hopper.

UMWA's president, Miller, affixed his signature, as requested, to the letter of November 23 and, on December 6, 1974, by telegrams notified Amax that he had signed the "letter of agreement submitted by Hopper," that the UMWA expected negotiations would begin in mid-December 1974, and the existing agreement covering the Belle Ayr Mine was further extended from December 12, 1974 to January 12, 1975, and explained that the delay in starting the negotiations with the Peabody Group was due to the necessity for the UMWA to first conclude the bituminous negotiations.

On or about December 10, 1974, Payne phoned Yablonski and told him that Amax had been unsuccessful in making arrangements with the people who were involved in the negotiations for the Peabody Group and Amax intended to bargain independently and Payne wanted to meet with Yablonski to make arrangements to discuss some of the matters pertaining to the negotiations. They agreed to meet December 17, 1974, at the offices of the UMWA in Washington, D.C.

On December 17, 1974, Payne and John Cairns, Amax's director of industrial relations, and Roger Sonnemann, Amax's corporate vice president of administration and employee relations, met with Yablonski and UMWA Staff Representative Don Pierce. Payne informed Yablonski that Amax was not able to make satisfactory arrangements with the Peabody Group and, as a result, intended

to bargain independently for a contract covering the Belle Ayr Mine. Yablonski replied in substance that he wondered what Amax's position was on this matter. The Amax representatives then brought up a number of contractual provisions either included in its existing agreement with the UMWA or in the recently negotiated National Bituminous Coal Wage Agreement of 1974 and indicated that Amax would be asking for different provisions in these area. Yablonski stated that, in negotiating contracts covering the western mines, the UMWA would be seeking uniformity and would use the National Bituminous Coal Wage Agreement of 1974 as a basis for the negotiations. Pierce requested Amax to furnish the Union with certain information needed for bargaining. Amax's representatives indicated they would honor the request.[5] Finally, at the conclusion of the meeting Sonnemann informed Yablonski that he wanted there to be no misunderstanding about Amax's position regarding the negotiations, that he wanted it to be absolutely clear Amax intended to bargain separately for a contract covering the Belle Ayr Mine and the Peabody Group had no authority to bargain for Amax. Yablonski by a nod of his head acknowledged that he understood what Sonnemann had stated and made no remark indicating he disagreed.[6]

On December 18, 1974, Payne wrote Yablonski a letter which in substance confirmed that in accordance with the

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[5] Cairns by letter of December 26, 1974, furnished Pierce the requested information.

[6] The above description of what occurred at the meeting of December 17 is based on a composite of the credible testimony of Payne, Cairns and Sonnemann. I reject Yablonski's testimony that this meeting was prompted by Pierce's oral requests for information and that neither Payne nor Sonnemann indicated Amax intended to negotiate independently of any association for a contract covering the Belle Ayr Mine. pierce was not called upon by the UMWA to corroborate Yablonski's testimony. Also, Yablonski failed to deny Payne's testimony set forth, *supra*, that on or about December 10, 1974, in arranging the December 17 meeting, Payne in effect told Yablonski that Amax had decided to negotiate a contract on its own rather than through the Peabody Group and wanted to meet with Yablonski to discuss some of the matters pertaining to the negotiations.

parties' discussion of December 17, Amax would negotiate with the UMWA for a contract covering the Belle Ayr Mine; the UMWA would advise Amax in the near future of a specific date when the negotiations would start; Amax was flexible concerning the site of the negotiations and would accept any location selected by the UMWA but expected an equal distribution of the cost for the use of bargaining facilities; Amax planned to use a negotiation team of four persons plus staff specialists as warranted; and, prior to discussing substantive matters, the parties would resolve certain procedural matters pertaining to the negotiations. The letter concluded with a summary of Amax's general bargaining objectives.

On December 6, 1974, the National Bituminous Coal Wage Agreement of 1974 was executed. Thereafter, the UMWA made final preparations for negotiations of a Western Agreement to cover the western sub-bituminous and lignite mines. On December 19, 1974, members of the UMWA staff and the Western Bargaining Council attended the Western District Conference in Denver, Colorado.[7] The conference was attended by delegates from every mine that would be covered by the Western Agreement. The purpose of the conference was to allow rank-and-file miners to recommend goals to the negotiators. The recently negotiated National Bituminous Coal Wage Agreement of 1974 was reviewed in detail. There was strong collective sentiment that as much of this agreement as possible should be carried over into the Western Agreement. In addition, the delegates specifically endorsed seeking a wage rate and a system of job classifications in the Western Agreement which differed from the National Bituminous Coal Wage Agreement of 1974. There was then a brief meeting of the UMWA Western Bargaining Council, and its staff, to prepare for the meeting with the Peabody Group scheduled for the following day.

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[7]The Western Bargaining Council was composed of UMWA International Executive Board members and the presidents of District 15 and District 22, the two districts with jurisdiction over mines that would be covered by the Western Agreement.

The first negotiating session between the UMWA and the Peabody Group took place on December 20, 1974, in Denver, Colorado. The meeting was an exploratory session in which the parties reviewed the recently negotiated National Bituminous Coal Wage Agreement, article by article and section by section, and noted the areas of agreement and disagreement.

On December 30, 1974, Payne, who had not heard from the UMWA about contract negotiations, phoned Yablonski's office. Yablonski was out of town so Payne, in substance, told Yablonski's secretary, Sylvia Cash, he was calling about the negotiations between Amax and the UMWA for a contract covering the Belle Ayr Mine and asked that Yablonski contact him about the matter as soon as possible. Cash relayed Payne's message to Yablonski, who, the same day, instructed Cash to notify Payne that Yablonski was under the impression that Amax was part of the Peabody Group and would bargain as a part of that group. Cash told this to Payne, who denied it and immediately sent Yablonski the following telegram: "As per our discussion with you on December 17, 1974, it remains our intention that Amax Coal will bargain with the UMWA for the Belle Ayr Mine operation independently." There was no reply to this telegram.

Based upon the district conference meeting, *supra*, and the meeting with the Peabody Group, *supra*, the UMWA staff prepared a package proposal to submit to the western coal producers. The proposal was reviewed by the UMWA Western Bargaining Council and a copy of the revised proposal was submitted on January 6, 1975, to the Peabody Group, Amax and Pittsburg and Midway Coal Mining Company, herein called P & M,[8] all of whose representatives had assembled in Denver, Colorado, for the purpose of negotiating with the UMWA negotiating team. Previously, Yablonski had agreed to Payne's request that representatives of Amax and the UMWA should meet in Denver on January 6, 1975.

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[8] P & M was one of the several coal producers with mines in the west which had chosen not to bargain through the Peabody Group.

2. The meeting of January 6, 1975

On January 6, 1975, five representatives from Amax met with five from the UMWA for about 3 hours in Denver, Colorado. Payne and Cairns headed the Amax team and Trbovich, an International Union vice president who was chairman of the UMWA Western Bargaining Council, headed the UMWA team.

Previously, as indicated, *supra*, the UMWA had transmitted a copy of a complete contract proposal to Amax. The proposal, entitled "Western Surface Mine Agreement," was patterned after the recently negotiated National Bituminous Coal Wage Agreement and was identical to the proposal submitted to the Peabody Group and P & M. Amax also submitted a proposed contract to the UMWA which was not a complete package insofar as it lacked provisions for job classifications, wage rates and health and retirement. The contract proposals differed in a number of significant areas and each one made a number of significant changes in the current agreement.

Payne opened the meeting by announcing that Amax's representatives were present to negotiate an agreement and had the authority to reach an agreement. He asked if the UMWA representatives had similar authority. Trbovich and Pierce, a UMWA staff representative, stated they had this authority but any agreement would have to be ratified by the employees.

The parties went through the UMWA contract package article by article. Amax's representatives objected to a significant number of the provisions. An objection was raised to the title of the contract, "Western Surface Mine Agreement," and the reference to "district agreements." Amax also took the position that Local 1854, the certified bargaining representative, should be a party to the contract and that, since Amax was bargaining for a contract to only cover the Belle Ayr Mine, the references to "mines" and "employers" was improper. Amax further objected to the management rights clause, the successorship clause and the union-security agreement proposed by the UMWA. Amax likewise challenged the legality and

propriety of the UMWA demands pertaining to "work jurisdiction," "coal lands," "contracting and subcontracting," "construction work" and "leasing, subleasing and licensing out of coal lands." Another Amax objection concerned the UMWA's proposed "exemptions clause" which Amax claimed was an improper attempt by the UMWA to control the number of supervisors employed by Amax. Regarding the UMWA pension proposal, Amax objected to making contributions into the "1950 Pension Trust" on the ground that the benefits only went to already retired miners of which there were none in the Belle Ayr unit. Amax also objected to contributing into the "1974 Pension Trust" on the ground that the employer trustees were already selected by other employers and Amax would be denied the right to select trust representatives of its own choosing. Also, Amax raised practical and legal objections to being subject to a Joint Western Surface Mining Training committee whose employer representatives would not be of Amax's own choosing.[9]

The parties agreed to meet again the following evening.

3. The meeting of January 7, 1975

The UMWA general counsel, Yablonski, was its chief negotiator in the bituminous negotiations which resulted in the National Bituminous Coal Wage Agreement of 1974 and was the chief negotiator in the subsequent subbituminous and lignite negotiations involving Amax and the other western surface mines. Following the meeting of January 6, 1975, Trbovich informed Yablonski that Amax had transmitted a contract proposal and the UMWA representatives did not know how to respond. Trbovich requested Yablonski's assistance. Yablonski assigned James Marketti, director of western organizing, to assist the UMWA representatives.

Marketti at the start of the meeting informed Amax's representatives that the UMWA did not intend to

[9] Although the concept of this training committee was discussed at the meeting of January 6, the UMWA did not propose it as a contract demand until its January 27, 1975 proposal.

negotiate a contract with Amax covering the Belle Ayr Mine but that their prior meeting, as well as the present one, was only for informational purposes. Marketti explained that Amax was a part of the Peabody Group and, as such, would negotiate as a part of that group and be covered by the contract the UMWA negotiated with the Peabody Group. In response to Payne's question, Marketti explained that the reason the UMWA representatives had not stated this previously was they had been taken by surprise when Amax handed them a set of contract proposals. Amax's negotiators objected to the UMWA's bargaining position. The parties argued about this matter and finally, at the suggestion of Amax, agreed not to adjourn but to review Amax's contract proposal without either side waiving its position.

The parties reviewed Amax's January 6 contract proposal. Amax's representatives explained why various provisions therein differed from those included in the recently negotiated National Bituminous Coal Wage Agreement to which Amax was a party.[10] When the question of why Amax intended to formulate its own pension program arose, Gruender, for Amax, advanced the same objections to the UMWA program as were advanced the previous day and also stated that Amax wanted to negotiate only about pension benefits because it regarded the matter of cost as its own business.

Near the conclusion of the meeting Marketti warned that in the event a contract was not reached by January 12, 1975—the date the current contract covering the Belle Ayr Mine was scheduled to terminate—the UMWA would strike. He repeated that Amax was a part of the Peabody Group for contract negotiations and if no contract was reached with the Peabody Group by that date the UMWA would be forced to strike the Belle Ayr Mine as the miners would not work without a contract and, added, Amax could expect "to have problems everywhere. You know

[10] Amax's midwestern mines, through its membership in the BCOA, are a part of the multiemployer group covered by the National Bituminous Coal Wage Agreement of 1974.

how coal miners are." Payne asked what Marketti meant to insinuate by this remark and another company representative asked if Marketti was making a strike threat against Amax's midwestern mines. Marketti did not answer but instead Trbovich spoke to Elkins Payne, stating "come on Elkins you have been in this business for how many years? You know exactly what we are talking about."

The meeting concluded with the Company's bargaining team asking if the UMWA was still refusing to bargain. UMWA's representatives stated they would bargain with Amax but only as a part of the Peabody Group. It was agreed that the UMWA would notify Payne the next day whether it would bargain separately with Amax.[11]

4. The events between January 8, 1975 and February 3, 1975

On January 8, 1975, Yablonski informed Amax, by hand-delivered letter, that the UMWA believed Amax had joined the Peabody Group for purposes of contract negotiations and Amax's withdrawal from this group was untimely, thus, Amax was bound by any agreement negotiated by the Peabody Group with the UMWA. Payne, by letter of January 9, replied that Amax never joined the Peabody Group; if it did join, its agreement to join was null and void because it was coerced; and, if its membership was uncoerced, then it was released because the UMWA breached its part of the bargain.

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[11] Four witnesses testified about this meeting. Payne, Cairns and Sarno for the General Counsel and Charging Party. Marketti for the UMWA. The description of what took place is based upon a composite of the testimony of Payne and Sarno. They impressed me as trustworthy and reliable witnesses. Marketti did not. Cairns, with respect to this meeting, did not impress me as a trustworthy witness. Moreover, the reliability of his memory concerning the events is suspect inasmuch as he testified the parties reviewed for the second time a number of the provisions included in the UMWA contract proposal which had already been reviewed at the January 6 meeting. Payne and Marketti both agree that the parties on January 7 reviewed Amax's contract proposal, not the UMWA's proposal.

On January 12, 1975, the UMWA struck the Belle Ayr Mine and the other western coal operators whose employees it represented. Amax's negotiators in an effort to avoid a strike, on the evening of January 11, 1975, hand-delivered a new contract proposal to the UMWA. Yablonski accepted the proposal but advised Amax's representatives that his acceptance did not constitute an agreement to bargain independently and refused to meet with them or to discuss the proposal. Also on January 18, 1975, Payne by telegram to Trbovich, the chairman of the UMWA's Western Bargaining council, requested a negotiation meeting. The telegram was ignored.

In the meantime during January 1975 the negotiations for a new agreement between the UMWA and the Peabody Group and between the UMWA and P&M continued. On or about January 15, 1975, the UMWA broke off negotiations with the Peabody Group because a lack of progress in the negotiations had led the UMWA to conclude that further bargaining would not be fruitful. At the time the UMWA broke off negotiations it had prepared a new contract proposal for submission to the Peabody Group and P&M, but instead submitted it only to P&M and continued to meet and negotiate with P&M's negotiating team. In addition, during the week of January 20, an event occurred which prompted the UMWA to sit down and bargain with Amax. The UMWA's general counsel, Yablonski, was notified in substance that the Board's general counsel, based on Amax's unfair labor practice charges, intended to issue a complaint charging the UMWA with violating the Act by refusing to bargain with Amax and, in conjunction with said complaint, intended to seek interim relief by way of a court injunction enjoining the UMWA's conduct.[12] In order to avoid the injunction proceeding and in an effort to settle the alleged unfair labor practices, thus avoiding the issuance of a complaint,

[12] On January 8, 1975, Amax filed its charge in this proceeding in Case No. 27-CB-900 alleging in substance that the UMWA had violated Section 8(b) (1)(B) and 8(b)(3) of the Act by unlawfully requiring Amax to designate some other employer as its collective-bargaining representative.

the UMWA decided to negotiate with Amax independently. Accordingly, on January 24, 29 and 30, 1975, Yablonski telegraphed Payne that the UMWA was willing to negotiate separately with Amax.[13] Also on January 24, Yablonski forwarded a contract proposal to Amax which was identical to the proposal submitted the same day to the Peabody Group. Payne in reply to Yablonski's telegrams agreed to commence negotiations and a meeting was scheduled for February 3, 1975, in Denver, Colorado.

5. The meetings of Feburary 3, 5 and 6, 1975[14]

During the week of February 3, 1975, the negotiating teams for Amax and the UMWA met in Denver, Colorado, on February 3, 5 and 6.[15] Payne and Yablonski were the chief negotiators.

The parties disagreed on the method of bargaining. Amax preferred to review each and every clause at the table and "sign-off" those on which agreement was reached. Yablonski objected on the grounds that it was too time-consuming and portrayed a lack of faith in each other. Amax's method was eventually adopted. Yablonski stated in effect that the UMWA wanted to adhere as closely as possible to the National Bituminous Coal Wage Agreement but where peculiar circumstances applicable to the west warranted a change, it would be made. He further stated that the UMWA wanted a uniform western agreement and was willing to set the pattern for such an agreement with whichever employer or group of employers showed the greatest movement at the bargaining table.

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[13] Yablonski transmitted several telegrams in order to satisfy the objections which Board agents voiced concerning the language of the telegram.

[14] Cairns testified for the General Counsel and the Charging Party, and Yablonski for the UMWA, about this series of meetings. To the extent their testimony is not consistent, I have credited Yablonski, who impressed me as the more trustworthy witness.

[15] During this week the UMWA negotiators were also engaged in bargaining in Denver with both the Peabody Group and P & M.

The parties used Amax's contract proposal of January 11 as a basis for discussion during these meetings. However, in the process they also discussed provisions included in the UMWA's contract proposal. On the great majority of significant matters the parties' proposals were poles apart. By the end of these meetings the negotiators signed off, that is, tentatively agreed to about 11 items, all of which were included in the UMWA's contract proposal. The UMWA agreed to nothing not included in its proposal. A substantial number of these "signed off" items had been included in the recently terminated agreement covering the Belle Ayr Mine or were required by law. In a number of areas Amax was in effect asking the UMWA to accept proposals which required the UMWA to give up something included in the recently expired agreement.

During these meetings Amax's negotiators renewed their objections to the UMWA's "exemptions clause" and to its "1950 Pension Trust" as well as the failure of the UMWA to include Local 1854 as a party to the contract. In response to Amax's objection about the "exemptions clause," Stevenson, a member of the UMWA's negotiating team, in effect stated that the UMWA could not change the language of this provision because it was included in the National Bituminous Coal Wage Agreement.[16]

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[16] Cairns testified that throughout all of the negotiation meetings, including those held during the week of February 3, Amax's negotiators reiterated the same objections of illegality previously uttered at the meetings held on January 6 and 7, 1975. On its face this testimony conflicts with the whole record inasmuch as it is undisputed that Amax changed its bargaining position with respect to a number of the proposals to which it had objected on January 6 and 7. Thus, for example, Amax's contract proposal which was on the bargaining table during the February negotiation meetings included a "successorship clause," a "construction clause" and a "leasing and subleasing out of coal lands" clause, identical in pertinent respects to the UMWA clauses objected to by Amax at the January meetings. Accordingly, throughout this decision where I have concluded that Amax's negotiators voiced objections to specific UMWA proposals alleged to be illegal or nonmandatory bargaining subjects, I have not relied upon Cairns' aforesaid generalization.

Another matter for lengthy discussion was the Company's proposal that employees absent for jury duty or funeral or personal or sick leave should receive their regular rate of pay, including regularly scheduled overtime pay. The recently negotiated National Bituminous Coal Wage Agreement and the UMWA's first contract proposal included the payment of regular overtime in connection with bereavement or jury duty or personal or sick leave pay. However, both the National Bituminous Coal Wage Agreement and the UMWA's first contract proposal provided a workday of 7¼ hours with the provision that miners could be worked 8 hours if they were paid time and one-half for the extra three-fourths of an hour. Since miners employed in surface sub-bituminous mines, like the Belle Ayr Mine, were regularly scheduled to work an 8-hour day, they were regularly paid three-fourths of an hour at the overtime rate. Thus, the contractual language reimbursing them for their regular overtime, in addition to their normal rate of pay, when they were absent for jury duty or sick leave, etc., was intended to compensate them for the amount of money they would normally have been paid. However, the UMWA's January 24 contract proposal, in a concession to the western employers, provided that the employees in these mines who normally worked 8 hours daily would no longer have to be paid time and one-half for hours worked over 7¼ but would instead receive a regular hourly rate for their 8-hour day, albeit they would receive a higher rate than paid those who did not regularly work 8 hours a day. Under the circumstances, the UMWA concluded that, since under its wage-and-hour proposal the western miners would no longer receive regular overtime, the other part of the contract proposal which provided reimbursement for this type of regular overtime to miners absent for various types of leave was inapplicable. Amax's negotiators, however, whose January 11 contract proposal included the payment of regular overtime to employees absent for authorized leave, could not understand why the UMWA no longer wanted this benefit and spent much time arguing with the UMWA's negotiators about the matter. Yablonski in effect

explained to them, as described above, why the UMWA had dropped this provision from its contract proposal and that it would not agree to such a proposal which under the circumstances was illusory.

6. The events between February 5 and February 13, 1975

The parties had scheduled another negotiation meeting for Friday, February 7, in Denver, Colorado. No bargaining session was held that day because the UMWA suspended negotiations until the following week. Yablonski came to the scheduled meeting and, in substance, stated that the UMWA was unhappy about the progress of the negotiations, that it felt the Company was dragging its feet, and the UMWA negotiating team was finding it physically impossible to conduct three sets of negotiations at the same time.[17] Yablonski stated that UMWA's president, Miller, had summoned the UMWA negotiating team back to the Union's headquarters in Washington, D.C., where there would be additional staff to serve as negotiators, thereby allowing the Union to meet with Amax at greater length. Yablonski further suggested that the negotiations be resumed under the auspices of the Federal Mediation and Conciliation Service. Payne stated that it was premature to ask the FMCS to assist in the negotiations.

The same day UMWA's president, Miller, telegraphed all of the western coal operators that he was directing the Union's negotiators to return to Washington, D.C., and was assigning additional staff to the negotiating team to insure that the Union "can meet simultaneously with separate companies or groups of companies at the same time to resolve our outstanding disputes." Miller asked the companies to have their representatives contact Yablonski's office on Monday, February 10, 1975, so that negotiations could be resumed.

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[17] As noted, *supra*, the UMWA during the week of February 3 was negotiating in Denver with the Peabody Group and P & M in addition to Amax.

On February 10, by letter, Miller requested the assistance of the FMCS in the Union's contractual dispute with Amax and the other western surface sub-bituminous and lignite operators. Miller suggested that mediation was necessary because bargaining with the Peabody Group had gone as far as it could go, that with respect to Amax the hostility at the bargaining table made negotiations almost impossible to conduct, that bargaining with P&M had stalled because this company seemed content to wait for the Peabody Group to reach agreement with the Union, and that other companies who were not members of the Peabody Group had shown little willingness to enter into serious negotiations but seemed to be waiting for a settlement between the Union and the Peabody Group.

Early during the week of February 10, Yablonski and Payne arranged for negotiations to resume on February 13 in Washington, D.C. In connection with the UMWA's request for mediation, Payne took the position that Amax did not feel the assistance of the FMCS was appropriate. Yablonski agreed to resume the negotiations without the presence of the FMCS.

7. The meetings of February 13, 14, 15, 17 and 18, 1975[18]

During the week of February 13, 1975, on 4 separate days bargaining sessions were held in Washington, D.C. Daniel Edelman, associate general counsel for the UMWA, replaced Yablonski as the UMWA's chief negotiator in the Amax negotiations. Cairns and Payne did most of the bargaining for Amax. Following the procedure used at the previous meetings the negotiators, at Amax's request, reviewed Amax's proposals section by section and signed off

[18] Edelman testified for the UMWA and Cairns for the General Counsel and Charging Party about what happened at this series of meetings as well as the meetings of February 19 and February 26, 1975, *infra*. In general, Edelman impressed me as a witness intent on giving an accurate and truthful account of what occurred. He impressed me as the more reliable witness. Accordingly, whenever there is a conflict between Edelman's and Cairns' description of these meetings, I have relied upon Edelman's account.

those items on which tentative agreement was reached.[19] The review of Amax's contract proposal started with the provisions dealing with wages and hours which was where the parties had left off at the conclusion of their last meeting. By the end of this series of meetings the negotiators had discussed all of Amax's contract proposals and, in the process, also discussed a number of the provisions included in the UMWA's contract proposal.

The parties signed off approximately 31 items, each one of which was included in the UMWA's contract proposal. In some of these instances Amax's proposal differed from the UMWA's proposal and, in signing off the item, Amax retreated from its position. In no case did the UMWA sign off an item that was not included in its contract proposal. As indicated, *supra*, in a number of areas Amax was requesting the UMWA to delete or modify contractual provisions which had been included in the recently expired agreement between the parties. These series of meetings ended without significant progress having been made in the negotiations. The parties' respective bargaining positions were still poles apart.

One of the Company's complaints, voiced repeatedly during these meetings, was it believed the UMWA was simply biding its time until an agreement was reached with the Peabody Group which agreement the UMWA would then expect Amax to sign. Edelman answered in these terms: the UMWA was seeking a uniform agreement to cover all of the sub-bituminous and lignite mines in the west which agreement would differ from the recently negotiated National Bituminous Coal Wage Agreement only to the extent necessary to be responsive to the operational conditions in the west that differed from those in the east and midwest; uniformity in collective-bargaining agreements had been the UMWA's policy historically, not just to insure employee's security, but because of the ease of administering and ratifying uniform agreements; this

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[19] This procedure was not followed in the case of the Company's proposals dealing with wages and hours which, at Amax's request, were reviewed as a package.

policy of contract uniformity, however, did not mean that the UMWA was, as contended by Amax, simply stalling with Amax until an agreement was reached with the Peabody Group, but the Western Agreement was evolving through the current negotiations between the UMWA and Amax and between the UMWA and P & M as well as through the negotiations with the Peabody Group; the UMWA could reach agreement first with Amax or P & M rather than the Peabody Group; the UMWA would demand that all of the western employers sign the first agreement executed in the west whether it be with Amax or the Peabody Group as this agreement would set the pattern; and that if the pattern agreement was arrived at with the Peabody Group, the UMWA's position would be that Amax sign an agreement identical to that agreed to with the Peabody Group except for those areas where Amax was able to convince the UMWA that conditions were genuinely unique to the Belle Ayr Mine so as to warrant a deviation.

Consistent with its policy of contract uniformity, the UMWA refused to "sign off" Amax proposals where punctuations and the placement of paragraphs or the use of certain words and phrases did not coincide with the UMWA's proposal, even though there was no difference in substance. The negotiators spent a substantial amount of time arguing about matters of this nature. Likewise, they argued about the refusal of the UMWA to "sign off" provisions which provided, in pertinent part, that Amax furnish employees free lunches; heat the employees' bathhouse sufficiently to keep them warm; and reimburse employees absent from work on excused leave for their regular overtime in addition to their daily rate of pay. Amax took the position that these provisions offered the employees substantial benefits, yet the UMWA refused to "sign them off" because of its instance upon uniformity. Edelman disputed this and explained to the Company's negotiators in detail why he felt that these alleged increased benefits were in fact illusory.[20] However, in discussing one of the

[20] I have considered the disputed provisions described above, in the light of Edelman's explanation for rejecting them, and conclude the

Company's other proposals, Edelman told the company's negotiators that in order to maintain contract uniformity, the UMWA would "give a lesser benefit [to] the Belle Ayr employees" than proposed by Amax. Also, there was another dispute between the negotiators, caused at least in part by the Union's insistence on uniformity, which involved the refusal of the UMWA to "sign off" for a provision proposed by Amax dealing with the operation of new machinery. Cairns stated he could not understand why the UMWA would not "sign off" this proposal inasmuch as the Company's was identical to the UMWA's. Edelman correctly pointed out to Cairns that the UMWA's proposal on this subject was not identical to Amax's and further stated that inasmuch as negotiations with the Peabody Group had produced agreement on language for this provision which differed from the UMWA's proposal it was the UMWA's desire to bring this changed language to Amax's attention.[21]

In connection with "idle day work," Edelman verbally agreed to a change in the language proposed by Amax when it was pointed out by Amax's negotiators that the UMWA proposal, "Idle day work must be equally shared in accordance with the practice and custom, [and] an idle day over time roster must be kept up to date and posted," did not make sense in the context of a 7-day operation and suggested using different terminology. Edelman agreed that the Company's position made sense and in the UMWA's subsequent contract proposal of February 24, 1975, changed the pertinent language from "over time roster" to "work roster." In addition, Edelman assented to the limitation of the Mine Communications Committee concept to the Belle Ayr Mine alone and to the deletion of any reference to operations on Indian Lands in the discrimination Article. I reject, however, Edelman's unde-

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record as a whole establishes Edelman acted out of a good-faith belief in taking the position that these proposals did not provide significant benefits to the employees.

[21] The UMWA's modified new machinery proposal was tendered to Amax at the next meeting.

nied testimony that it was at this series of meetings that Amax asked that swing shift crews that removed overburden be assigned only for classifications which worked 7 days a week and that the UMWA adopted this proposal. Edelman is mistaken in this respect because the UMWA proposal of February 13, 1975, provides in pertinent part: "employer shall establish swing shifts for those job classifications which perform overburden removal operations which operate on a 7 day continuous basis." Likewise, I reject his undenied testimony that during this series of meetings, in agreement with the Company, the UMWA agreed to delete a reference to coke plants contained in its wages and hours proposal. I am unable to find any such reference in the UMWA's proposals on the bargaining table at that time.

In connection with the so-called "coal lands" clause and the one dealing with employees' bereavement pay, Edelman indicated that the union agreed to supplement the language of these clauses with a memorandum of understanding dealing with the notice employees were required to give prior to absenting themselves for bereavement leave and that the "coal lands" clause would only apply if the UMWA became the duly recognized bargaining agent of the employees in question.[22] Also, Edelman indicated that, in order to meet an operating problem peculiar to the Belle Ayr Mine, the UMWA was amendable to drafting a memorandum of understanding which would indicate that it was the intent of the contract that coal could be processed on the 7th consecutive day of work for the purpose of loading unit trains.

Regarding the Company's health and retirement proposal its negotiators, in response to Edelman's questions,

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[22] I recognize that on February 17, 1975, when the UMWA submitted its new proposal dealing with the Company's coal lands, it failed to submit a memorandum of understanding which Edelman had previously stated it was prepared to do. Nonetheless, I am of the view that Edelman's undenied testimony that he made such a promise is not so inconsistent with the failure to submit the memorandum with the new proposal so as to make his testimony inherently incredible.

indicated the proposal was not intended to give retirement credit to employees for services rendered prior to the effective date of the agreement, nor was it intended to encompass the concept of portability. Likewise, in response to Edelman's request to see the trust documents for the Company's plan, Payne indicated the documents were not in the possession of the negotiators. Edelman stated the UMWA was opposed to a welfare and pension program which covered only the Belle Ayr Mine but favored a nation-wide plan like the one included in the UMWA's proposal which the UMWA felt offered the employees better protection. The parties argued over which plan provided better benefits.

8. The events between February 18 and February 26, 1975

On February 19, Cairns for Amax submitted a new contract proposal to Edelman and, at great length, accused the UMWA of bargaining in bad faith and expressed the hope that the next time the parties met the UMWA would be more flexible and not negotiate with a closed mind. Edelman refused to engage in a debate.

Amax's contract proposal of February 19, 1975, when viewed in the light of the parties' positions taken at the bargaining table and the contract proposal which it had supplanted, offered virtually no additional concessions of significance.

On or about February 22, 1975, the Peabody Group and the UMWA entered into an agreement, herein called the Western Agreement, which became effective approximately 1 week later. The miners employed by the several operators covered by the Western Agreement returned to work approximately March 3, 1975. The miners employed by Amax and the other operators whose western mines were not members of the Peabody Group continued to strike. The Western Agreement did not become effective for about 1 week because it had to be approved by the UMWA Western Bargaining Council and then ratified by the membership. All of the membership employed at the

western mines represented by the UMWA, including the Belle Ayr Mine, participated in the ratification vote. However, only the votes of the miners employed by those operators who belonged to the Peabody Group were included in the ratification tally. Yablonski credibly testified that members not covered by the Western Agreement were allowed to vote so that the UMWA could use their expression of support for the Western Agreement as ammunition in convincing the other operators to agree to its terms and that if an independent, such as Amax, signed an agreement substantially the same as the Western Agreement it would not be necessary to hold another ratification vote among its employees, thus emabling them to return to work several days earlier.[23]

On or about February 22, the UMWA in the process of submitting the Western Agreement for membership ratification distributed a message to its membership in the west which in pertinent part reads:

> Our negotiations have been held with several companies participating either individually or in groups. We can report to you that as of the time this document is being prepared, we have secured an Agreement with the Peabody Group, which represents
> . . . .
>
> As recommended by the District Conference and pursuant to longstanding International policy, we expect to secure agreement from the remaining companies to the proposed contract submitted to you for ratification. Those companies include [name five companies, one of which is Amax].

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Between March 3 and March 15, 1975, the UMWA in its biweekly publication, UNITED MINE WORKERS

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[23]The UMWA reached agreements with Big Horn Coal Company in the middle of March 1975, with P & M about April 28, 1975, and with North American Coal Corporation about June 6, 1975, covering their western mines. These agreements were significantly different from the Western Agreement, thus, they had to be approved by the Western

JOURNAL, in an article announcing the ratification of the Western Agreement, stated that the miners employed by Amax and four other western coal producers remained on strike but had voted on the Western Agreement, "because the UMWA expected to win the same basic contract for them."

9. The meeting of February 26, 1975

On February 26, 1975, a meeting was held at the Washington, D.C. headquarters of the UMWA between Cairns and Edelman at which time the Western Agreement was offered to Amax as a package proposal.

The meeting had been arranged to discuss the parties' respective medical and pension proposals. In particular each party had indicated a desire to look at copies of the trust documents of their respective plans. Present at the meeting with Cairns was a Mr. Steinbeck, employed by the Metropolitan Life Insurance Company. Edelman was accompanied by Pierce, a UMWA staff representative, with expertise in this area.

Edelman gave Cairns the pertinent documents for the UMWA's health and retirement programs. Cairns informed Edelman that the Company did not have the trust documents for its plan and Steinbeck stated that his knowledge was in the area of health and accident plans not pensions, and he was without any knowledge about the Company's pension proposal. A summary outline of the Company's health care proposal, which in substance was similar to the outline contained in the Company's contract proposal, was furnished to Edelman and Pierce, who asked several questions which were answered by Steinbeck.

At the end of the meeting Edelman handed a copy of the Western Agreement to Cairns and stated that Amax should consider it as the UMWA's contract proposal. Edelman informed Cairns that Amax's employees would participate in the ratification of the agreement but their

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Bargaining Council and ratified by the miners employed at these mines.

votes would not be counted in the final tally and explained the reason for the use of this ratification procedure. Edelman also stated that if the Western Agreement was ratified by the membership, the UMWA expected that Amax would accept the terms of this agreement. Cairns protested.

Also discussed was the subject of the "District Agreements" referred to in the Western Agreement. Edelman, at Cairns' request, furnished him with copies of these agreements but in effect told Cairns that Amax would not be bound by any of the terms contained in the "District Agreements."[24]

A review of the provisions of the Western Agreement, in comparison with the UMWA's previous contract proposal and with Amax's contract proposal, reveals that the parties' bargaining positions were as far apart as ever. The only concessions of significance which this agreement offers Amax is the provision dealing with the 1950 Pension Trust wherein, in contrast to the UMWA's previous proposal, the Western Agreement does not require payment by the Company into this trust. As noted earlier, Amax's negotiators at the meeting of February 3 objected to contributing into the 1950 Pension trust inasmuch as it had no employees who were eligible, or could be eligible, for benefits under this trust. Thereafter, the UMWA verified that this was true for Amax and apparently also determined that all of the other western coal producers were in the same situation as Amax. Thus, the Western Agreement, unlike the National Bituminous Coal Wage Agree-

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[24]The description of what occurred at this meeting is based upon a composite of the testimony of the sole witnesses, Cairns and Edelman. In testifying about this meeting, neither one impressed me more or less than the other. Generally, their testimony was not inconsistent. In one instance, however, there appears to be a material conflict. Edelman's testimony can be construed to constitute a denial that he told Cairns the UMWA expected Amax to execute an agreement which contained the same terms as the Western Agreement. In this regard, I credit Cairns' whose testimony is consistent with the contemporaneous message, described, *supra*, that the UMWA was distributing to its membership.

ment of 1974, does not require contributions into the 1950 Pension Trust except to the extent necessary to cover the actual expenses of providing benefits to employees.

10. The meeting of March 4, 1975

This meeting was held in Washington, D.C., at the offices of the Federal Mediation and Conciliation Service. William Hobgood was present for the FMCS. Also present for the first time with Amax's negotiating team was the president of the Company, Hollie Hopper, who was there at Hobgood's suggestion. Yablonski, the UMWA's chief negotiator, had indicated to the FMCS that if the negotiations were to move off "dead center" he felt it was important that some senior company executive be present, so the UMWA negotiators could demonstrate that the problems which had prevented the parties from reaching agreement were the fault of Amax's, not the UMWA's negotiators.

Amax's negotiators in effect stated they did not desire to execute the Western Agreement. They objected to the agreement's health and retirement provisions, in particular to the fact that the Company was not able to select its trustees. They also objected to Article I, the Enabling Clause, stating that it contained unlawful provisions. Likewise, the illegality of the Work Jurisdiction, Exemptions, Coal Lands, Leasing out of Coal Lands, Contracting and Subcontracting, and Construction clauses were challenged. Yablonski, on the other hand, attempted to persuade the Company's negotiators that they should come to an agreement with the UMWA "like Peabody and the others."

Commissioner Hobgood, after listening to both sides, indicated he understood the UMWA's position with respect to contract uniformity but stated Amax did not want to sign the Western Agreement and asked if there was some middle ground that could be pursued where an agreement might be reached without either party losing face. Yablonski and Edelman indicated that the UMWA would be willing to enter into a memorandum of under-

standing to clarify the intent of contractual provisions and to enter into a memorandum of understanding which would provide for deviations from the Western Agreement but only if Amax demonstrated that the peculiar nature of the Belle Ayr Mine necessitated such deviations.

11. The meeting of March 7, 1975

On March 7, Payne visited Edelman at the Washington, D.C. offices of the UMWA and expressed a desire to meet with him to explore the use of memoranda of understanding as a device to satisfy Amax's objections to the Western Agreement.

Payne and Edelman agreed this would not be a negotiating meeting in the usual sense. They were meeting only to explore avenues of agreement and further agreed that neither party was waiving its current bargaining position by the conduct of Payne or Edelman at this meeting. Edelman told Payne that he had no authority to commit the UMWA to his (Edelman's) views expressed during their discussion but stated that the UMWA wanted to break the bargaining deadlock and he was convinced that his (Edelman's) thinking would be given careful consideration.

They reviewed every one of the disputed issues.[25] Payne voiced Amax's objections. Edelman articulated what he felt would be a memorandum of understanding which would deal with the objections to the Company's satisfaction. Payne also did the same.[26]

The meeting, which lasted about 3 hours, concluded with Edelman stating it was his opinion that it had been a

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[25] They were unable to review the matter of health and retirement, as Edelman told Payne that he was unable to intelligently consider the Company's proposal until he was furnished with the basic document for the Company's program. Payne replied that the trust documents were not in his possession.

[26] In particular, on the matter of "District Agreements," Edelman proposed a memorandum of understanding stating that the existing District Agreements did not cover the Belle Ayr Mine.

very constructive meeting and there seemed to be a basis for reaching agreement "fairly quickly."

12. The meeting of March 14, 1975[27]

On March 14, a Friday, Payne telephoned Edelman and arranged to meet with him that day at the UMWA's headquarters in Washington, D.C. Payne did not indicate the nature of the visit. Edelman expressed the hope that they would be able to talk along the same lines as their previous meeting.

Later that day, in the middle of the afternoon, Payne, accompanied by Gruender, one of Amax's lawyers, met with Edelman as arranged. Payne presented Edelman with a complete contract proposal, which he described as the Company's "final proposal," and requested the UMWA to notify Amax by the end of the day whether it accepted or rejected the proposal. A rejection of any part of the proposal, explained Payne, would constitute the rejection of the entire package. Edelman expressed surprise at Amax's conduct and asked whether the avenues of settlement discussed between himself and Payne the previous week were still open. Payne answered in the affirmative. Gruender asked when Amax could expect the UMWA's answer to its "final proposal." Edelman stated he hoped to be able to get back to Payne by the close of business Monday, March 17. Either Gruender or Payne emphasized that if the UMWA by that time did not indicate it would accept the proposal that Amax would consider it as having been rejected and intended to implement the terms of the proposal.

Amax's March 14 contract proposal modified over 40 sections of its previous contract proposal so that they agreed with comparable provisions of the Western Agreement and modified other sections so they substan-

[27] Edelman for the UMWA and Payne for the General Counsel and the Charging Party testified about this meeting. In those instances where their accounts do not jibe, I have credited Payne's testimony inasmuch as, with respect to this meeting, he impressed me as the more credible witness.

tially conformed with the comparable provisions of the Western Agreement. These concessions, considered with Amax's previous concessions plus the substantial similarity in the economic benefits—wages and fringe benefits—contained in the parties' proposals, establishes that Amax's March 14 proposal significantly narrowed the gap between the parties' bargaining positions even though they still remained far apart about several significant matters.

Gruender and Payne told Edelman about the areas where the Company's proposal differed from the Western Agreement and explained the reasons for the differences. Edelman asked questions which they answered. Edelman, although he did not expressly state whether the UMWA would accept or reject the offer, stated he felt that in order for the Amax package to be acceptable it would have to include "at least" the UMWA health and retirement program and a common expiration date with the Western Agreement, and that the matter of a common expiration date was of such importance to the UMWA that its absence would prevent the acceptance of the Company's proposal.

Regarding Amax's health and retirement plan, Edelman asked to see the trust documents, explaining to Payne and Gruender that it was not possible for the UMWA staff to intelligently evaluate what Amax was proposing without reviewing the trust documents and for the UMWA to agree to deviate from its own proposal which had historically benefited the employees in the industry for a program as yet not fully defined would be too risky. Gruender in substance answered that no trust documents existed explaining that it was too impractical and expensive to prepare them in advance of the UMWA's agreement, at least agreement in principle, to the retirement plan proposed by Amax. Also, Gruender stated that Amax's insurance program contemplated 10-year vesting and reciprocity with the UMWA pension program or immediate vesting if reciprocity was not available.

13. The events between March 14, 1975 and May 28, 1975

On Monday, March 17, three members of the UMWA Western Bargaining Council met at union headquarters in Washington, D.C., to review the Company's final proposal. They were the only ones able to come to Washington for a meeting on such short notice. The discussion centered chiefly around the question of whether the UMWA should accept an agreement which did not include a common termination date with the Western Agreement and which included a pension program different from the type of program historically included in agreements signed by the UMWA. Edelman at the end of the day phoned Payne and told him that the Union needed more time and that Amax's final proposal was still under consideration and had been neither accepted nor rejected. Payne took the position that the language therein was not new to the UMWA[28] and its failure to accept the proposal constituted a rejection. Edelman stated that the UMWA would continue to consider the proposal.

On March 17, shortly after the aforesaid phone conversation, Amax telegraphed the UMWA that it intended to place its final offer into effect immediately. On the same day, by letter, Amax notified the miners on strike at the Belle Ayr Mine that the facility, which had remained closed since the start of the strike, would now resume operations, that Amax hoped the strikers would return to work and told them that its final bargaining offer which the UMWA had rejected was equal to and in some cases better than the UMWA's contract proposal and further informed them that its negotiations with the UMWA had reached an impasse and that the Company intended to im-

[28] Amax's proposal was compromised of provisions included in the UMWA's Western Agreement, provisions not included in the Western Agreement but which had been included in Amax's previous proposals, provisions which deviated only slightly from the Western Agreement, and a few provisions, i.e., a portion of the pension proposal, substantially different from anything previously submitted to the Union. In short, virtually every significant provision contained in the Company's contract proposal was familiar to the UMWA's negotiators.

plement the terms of its final offer retroactive to March 14, 1975.

On March 20, the Belle Ayr Mine resumed operations with supervisors and the following week strike replacements and strikers who abandoned the strike began working. As promised, Amax placed into effect its final offer of March 14 retroactive to that date.

On April 10, 1975, Yablonski telegraphed Amax: "UMWA rejects Amax last offer. UMWA last offer stands with the following exceptions: Immediate reinstatement of all employees; Increase of catch up allowance to $500;[29] Dismissal of all litigation."

14. The meeting of May 28, 1975

The next bargaining session took place under the auspices of the FMCS on May 28 at Washington, D.C. The meeting focused on the issues which divided the parties and all of these issues were discussed.

Amax's negotiators pointed out the clauses which it felt the UMWA could not lawfully insist upon.[30] Yablonski indicated that the demands of the UMWA for a common expiration date with the Western Agreement and for its own pension program would not be compromised. He explained in detail the reasons for the UMWA's insistence on its own pension proposal and pointed out that the Union had never agreed to a pension plan other than a tripartite administered plan sanctioned by Section 302(c)(5) of the Act. Payne took the position that the UMWA had no legitimate interests in either the costs or the administration of such a

[29] A reference to the UMWA's proposal for a "retroactivity allowance" which in substance provides that Amax will pay the returning strikers a sum of money in consideration of the extension of the previous agreement and the increase in the cost of living which occurred since the employees' last wage increase.

[30] Payne testified that there was a discussion at this meeting about those contract provisions which Amax thought were unlawful and that the Company just generally reviewed its position and recited those "things" that it thought were unlawful. Payne was unable to recall what was stated or what clauses were mentioned.

program but should only be concerned about the benefits. Yablonski, at the conclusion of the meeting, stated that a major issue which the UMWA had not forgotten was the question of reinstating the strikers. Sonneman, one of Amax's representatives, indicated that this was an issue about which Amax also felt strongly.

The meeting concluded without any change by either party from their prior bargaining positions.

15. The meeting of June 16, 1975

On June 16, Yablonski met in Washington, D.C., for about 5 hours with Roger Sonneman at the latter's hotel. The meeting was arranged under the following circumstances. Sonneman, Amax's corporate vice president in charge of administration and employee relations, is not normally a member of the Company's bargaining team but did attend the May 28 bargaining session, as described, *supra*. After the May 28, meeting, Yablonski had mentioned to an official of the FMCS that Sonneman's presence was very helpful and his presence at future meetings might help the parties reach agreement. The June 16 meeting was arranged by the FMCS.

Sonnemann started the meeting by explaining that Amax's negotiators did not know he was meeting with Yablonski and stated his purpose in meeting with Yablonski was to explore the parties' major differences so as to determine whether the differences could be narrowed to the point where an agreement was possible.

Yablonski and Sonnemann, in a very candid fashion, discussed the major issues separating the parties. Whether this resulted in Yablonski or Sonnemann, or both of them, indicating they would be willing to make significant compromises on a large number of the disputed issues, as Yablonski testified, or whether they indicated only a few areas of possible concession, as Sonneman testified, it is a difficult question. Neither witness, in testifying about this meeting, impressed me as particularly trustworthy. I received the impression that each one was prone to exaggerate. Yablonski to maximize and Sonneman to minimize the

extent of compromise suggested by one or the other. In any event, Yablonski's undenied testimony and Sonneman's testimony establishes that Yablonski during the discussion of several disputed contractual provisions made statements which were calculated to lead Sonnemann to believe that Yablonski was seriously considering concessions in those areas. Accordingly, at the end of the meeting, Sonnemann asked Yablonski to have the Union submit a revised bargaining proposal to Amax incorporating these concessions which, Sonnemann stated, might help break the bargaining deadlock. Yablonski replied that the UMWA would do this and further stated that he was confident that, with the kind of good will that had been displayed during the just concluded meeting, the parties could reach agreement in the near future.

16. The events between June 16, 1975 and July 21, 1975

On June 20, Yablonski telegraphed Sonnemann that the UMWA was in the process of preparing a new contract proposal for submission to Amax. In reply Sonnemann, on June 23, telegraphed Yablonski that before resuming face-to-face bargaining Amax wanted to review the UMWA's new contract proposal to determine whether a meeting would be constructive. On July 1, by mail, Yablonski transmitted copies of a new contract proposal to Amax.

The new contract proposal was accompanied by a conciliatory letter from Yablonski which in pertinent part explained and summarized the changes made in the UMWA's previous proposal—the Western Agreement—and indicated the areas where the Union felt that there was still substantial disagreement. Yablonski concluded this letter by urging that Amax "evaluate [the July 1 contract proposal] in the spirit in which it has been presented, and that you promptly agree to reopen face to face discussions."

The July 1 contract proposal in a multitude of areas deviated from the terms of the Western Agreement and made numerous concessions in virtually every disputed

area.[31] The UMWA remained unyielding, however, with respect to its demands that Amax accept a contract termination date in common with the rest of the industry; accept the UMWA 1974 Pension and Benefit Trusts; and reinstate the strikers to their former jobs immediately upon the end of the strike. Also, in several of the areas where the Union had made concessions the parties' respective proposals were still apart but the overall distance separating them had closed appreciably.

On July 3, upon receipt of the UMWA's new contract proposal, Payne telegraphed Yablonski acknowledging its receipt and stated: "We will review and analyze the new proposal expeditiously and upon completion of the analysis, will contact you." On the same day Amax filed an amended charge in Case No. 21-CB-900 in which it alleged, in pertinent part, that the Union in violation of Section 8(b)(3) was engaging in "bad faith surface bargaining."

Two weeks passed without a word from Amax concerning the Union's new contract proposal or about negotiations. In view of this lack of communication Yablonski on July 17 telegraphed Ian MacGregor, the chairman of the board of directors for Amax, Inc. Yablonski accused Amax of engaging in dilatory bargaining tactics, stating that he had not received any "direct word" from the Company's negotiators, even though the Union's contract proposal had been delivered to them 2 weeks previously. He also informed MacGregor that the UMWA "in line with its interests as a bargaining agent in an energy field and interests of our members as consumers" had investigated the Company's domestic and foreign activities and were convinced "there are a number of areas which merit the lodging of complaints with appropriate agencies, the com-

[31] Also, in the area of sickness and accident benefits the Union, in Yablonski's covering letter, stated it would agree to the Company's proposal if it would furnish to the Union a copy of its plan so that the Union could determine whether the eligibility and administrative provisions were equal or better than the Union's. If so, Yablonski stated, the Union would accept Amax's proposal.

mencement of litigation and urging various bodies of [C]ongress to commence inquiries" into Amax's activities. One of the reasons that the UMWA up to now had refrained from engaging in this type of conduct against Amax, Yablonski explained to MacGregor, was that it had hoped Amax and the Union would reach agreement on the terms of a collective-bargaining agreement. Continuing, the telegram sets out Amax's alleged improper activities uncovered by the UMWA and its contemplated actions.[32] The telegram warned that the Union's attorneys would cooperate with the various governmental agencies in investigating and prosecuting Amax for violating the law and concluded:

> Our deadline is July 22, the date of your special stockholders meeting, at which time you will be presented with a copy of the complaint and request for investigation which will be filed with the Federal Trade Commission at noon. At that time we will publically announce the filing of our formal complaint and request the FTC investigate the legality of Standard Oil Company of California's acquisition of 20% of your stock . . . as well as other areas of serious concern under the antitrust laws . . . . Your negotiators have left us with little choice but to bring to the attention of your stockholders and the general public the areas of activity by Amax which we believe to be unlawful . . . . Because of the seriousness of these matters to your company . . . I believe that you should be personally aware of our contemplated activities. I will be free to meet with your negotiators to consummate an agreement between the date and hour of this telegram and noon July 22, 1975.

On July 17, Yablonski telegraphed Payne a copy of the aforesaid telegram. The same day Payne by telegram acknowledged receipt of the MacGregor telegram and

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[32] In substance the telegram charges Amax with violating the Elkins Act; engaging in price fixing schemes with other coal and oil producing companies; making illegal contributions in connection with its foreign operation, and violating the antitrust laws by selling 20 percent of its common stock to Standard Oil Company of California.

stated, "pursuant to the request of William Hobgood of the FMCS, we plan to meet with you on July 21 at 1 p.m. as we agreed to do prior to the receipt of your telegram of today."[33]

17. The meetings of July 21 and July 22, 1975

On July 21 and 22, the negotiators met at the offices of the FMCS in Washington, D.C. Yablonski was asked at the start of the meetings about his July 17 telegram to MacGregor and whether the UMWA intended to bargain beyond noon July 22. He answered in the affirmative but explained that if a complete agreement was not reached by that time, the UMWA representatives planned to attend the July 22 Amax special stockholders' meeting as stated in the MacGregor telegram and the UMWA would, as stated in that telegram, also initiate proceedings against Amax with various government agencies.

During these meetings the negotiators discussed at length the first seven articles contained in the Union's July 1 contract proposal. Initially, Amax indicated that, of the disputed items included in the July 1 package, the following four were acceptable to Amax: (1) The provision concerning the downward adjustment of the cost-of-living allowance; (2) the provision that an employee on bereavement leave would make a reasonable effort to notify the employer of his intended absence; (3) a provision placing a "cap" on weekly overtime after 50 hours; and (4) agreed to pay double time to employees working beyond their normal workday on Saturday. In all other respects Amax rejected the section included in Articles 1 through 7 which dealt with matters in dispute. Realistically, Amax only agreed to two, not four, of the disputed items inasmuch as the record established that the cost-of-living downward adjustment language had been inadvertently left out from the Company's March 14 proposal and the bereavement leave notice language originated with Amax and was incorporated by the UMWA into its July 1 proposal.

[33] There is no evidence that Amax had arranged to meet with the UMWA prior to the receipt of the MacGregor telegram.

In connection with Article 1, Amax's negotiators objected to the omission of Local 1854 as a party to the agreement and to the inclusion of the "successorship clause" even though it had been included in Amax's March 14 proposal, explaining, through one of its attorneys, that it had come to Amax's attention that the Board's General Counsel had recently issued a complaint challenging the legality of the successorship clause. They also objected to those provisions in Article 2 entitled "Work Jurisdiction," "Exemptions Clause," "Application of this Contract to the Employer's Coal Lands," "contracting and Subcontracting," "Leasing, Sub-leasing and Licensing Out of Coal Lands" and "Construction." And in Article 3 they objected to a provision entitled "Cooperation and Development of Mine Plans" and objected to Article 6 which provided for a "Mine Communication Committee" despite the fact that the identical clause was included in Amax's March 14 contract proposal which was still on the bargaining table.

There was no discussion about the parties' health and retirement plans; however, Amax's negotiators did indicate that they still wanted an "independent" health and retirement program and rejected the Union's proposal.[34]

18. The July 22, 1975 stockholders meeting

On the afternoon of July 22, Amax held a special stockholders meeting in New York City for the purpose of ratifying the purchase of approximately 20 percent of its outstanding shares of common stock by the Standard Oil Company of California. The meeting was picketed and leaflets were distributed by the UMWA. Also, UMWA representatives attended and spoke up at the meeting.

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[34] Yablonski and Payne were the two principle witnesses who testified about the above-described meetings. In his manner and demeanor Yablonski impressed as the more trustworthy witness. Accordingly, where their accounts differ I have credited Yablonski's version, particularly his testimony that the subjects of striker replacement, the withdrawal of litigation and common expiration date, were not brought up or discussed.

The meeting was presided over by the Company's board chairman, Ian MacGregor, who was accompanied on the dias by other corporate officials and directors. In attendance besides the shareholders were UMWA Lawyers Nathan and Chapnick; International Executive Board Members Patterson and Edney; Local 1854 President Grant; and a Belle Ayr Mine striker, Cassiday. During the meeting these UMWA representatives spoke up and recited the FTC complaint filed that day by the UMWA challenging the legality of the sale of stock to Standard Oil, accused Amax of not bargaining in good faith with the UMWA and, in this regard, engaged in a debate with MacGregor who defended Amax's bargaining position. Also, the union attorneys and MacGregor debated the merits of the Company's unfair labor practice charges filed in the instant proceeding and, finally, striker Cassiday stated that he could not understand why Amax was refusing to accept contractual provisions proposed by the UMWA for its Belle Ayr Mine, even though the identical provisions were currently in effect at Amax's several eastern and midwestern mines.

19. The meetings of August 7 and 8, 1975[35]

On August 7 and 8 , the next bargaining sessions were held in Louisville, Kentucky. The UMWA was represented by Yablonski, the Company by its bargaining team. The section-by-section review of the Union's July 1 contract proposal which, on July 22, had stopped at Article 7 was resumed. However, at the start of the meetings, an Amax representative recited a list of clauses contained in the UMWA contract proposal—"successorship," "exemptions," "coal lands," "construction," "pension," "work jurisdiction," "leasing and subleasing," "contracting and subcontracting" and "training committee"—which Amax viewed as being unlawful and asked "if they [UMWA]

[35] Yablonski and Payne testified about these meetings. In manner and demeanor Yablonski impressed me as the more trustworthy witness. Accordingly, where their accounts differ I have credited Yablonski's version.

were going to continue to strike to demand what [Amax] considered to be unlawful demands." Yablonski answered "yes, they would continue their strike."

The parties reviewed at length each disputed section contained in the July 1 contract proposal starting at Article 8 until they finished the entire proposal. The discussion was completely unproductive. Yablonski explained why the UMWA proposals were reasonable. Amax's negotiators explained why they could not agree to them.

In connection with sickness and accident benefits, Yablonski's covering letter attached to the July 1 contract proposal, as indicated *supra*, stated that if Amax gave him an opportunity to review the documents upon which the Company's sickness and accident insurance proposal was based, there was a possibility that the UMWA could accept the Company's proposal. On August 7, Yablonski asked for a copy of the Company's sickness and accident program's insurance policy. He was informed that a copy was not available and instead was given a booklet which contained an incomplete description of the manner in which the plan was administered.

Regarding the subject of retirement, Yablonski explained that one of the reasons the Union was unable to accept Amax's retirement proposal was that the Union wanted to participate in the administration of the retirement program so as to be assured that the pension fund would be administered in the best interests of the employees and reminded Amax's negotiators that the Union had never been given an opportunity to examine the documents pertaining to the Company's program and stated that until he could examine those documents, Amax was asking the Union to engage in hypothetical bargaining.[36]

Regarding the UMWA's proposals concerning the reinstatement of the strikers and the withdrawal of litiga-

[36] I reject Payne's testimony that Amax's negotiators, at these meetings, presented Yablonski with copies of Amax's pension plan, pension trust agreement and reciprocal trust. The transmittal letter forwarding these documents to Yablonski, signed by Payne, was dated August 18, 1975.

tion, there was absolutely no discussion of these matters as Amax's negotiators stated they thought it was premature to discuss those issues inasmuch as there were too many substantive issues dividing the parties.

Yablonski, when the negotiators finished reviewing the UMWA contract proposal, phoned several of the members of the UMWA Western Bargaining Council and told them about the results of the negotiations. The consensus was that in order to reach an agreement, the UMWA would have to modify its July 1 proposal and offer additional concessions. Yablonski was advised to make no further concessions at that time but to meet with the bargaining council the following week to receive further instructions. Yablonski communicated this information to Amax's representatives and the meeting ended.

20. The events between August 8, 1975 and October 9, 1975

On August 18, Yablonski telegraphed Payne that he had met with the Western Bargaining Council and they had concluded that "the lack of any substantial movement by Amax and its failure to make a formal counterproposal leaves us with little choice except to advise you that we will not bargain with ourselves by submitting yet another proposal to you containing still more concessions by us. If and when you desire to engage in serious bargaining, we will be prepared to do so." On August 19, Payne telegraphed Yablonski to the effect that it was the UMWA's conduct which had stalled the negotiations, that the UMWA's July 1 contract proposal contained no substantive concessions and that Amax was prepared to continue bargaining.

21. The meeting of October 9, 1975[37]

Yablonski and Edelman, the UMWA's chief negotiators, were scheduled to leave the employ of the UMWA on Oc-

[37] Cairns and Trumka were the principal witnesses who testified about this meeting. In those instances where their testimony is inconsistent, I have credited Trumka's account inasmuch as he impressed me as the more trustworthy witness.

tober 20, 1975, thus, UMWA Staff Lawyers Richard Trumka and Richard Bank, then executive assistant to the UMWA president, were appointed to replace them as negotiators. They were briefed by Yablonski concerning the bargaining history.

The meeting of October 9, which was held in Indianapolis, Indiana, Amax's corporate headquarters, was initiated by Trumka under the following circumstances. In assessing its bargaining position after the almost 2-month hiatus in negotiations, the UMWA recognized that its bargaining position had eroded significantly;[38] so, to reach agreement it would have to make substantial revisions in its last contract proposal. It was also expected that the revisions would make the agreement so different from the National Bituminous Coal Wage Agreement and the Western Agreement that it would have a significant nationwide impact on further agreements and negotiating procedures. Accordingly, a meeting of the UMWA National Bargaining Council was scheduled for October 10 in Indianapolis, the day following the bargaining session between the UMWA and Amax. Trumka's purpose in arranging this bargaining meeting was to determine what, if any, possible areas of compromise existed which could be discussed with the UMWA National Bargaining Council, the next day, in an effort to draft a revised contract proposal.

At the start of the October 9 meeting Bank and Trumka stated that the purpose of the UMWA in asking for the meeting was to find out whether the Company was amenable to compromise in any of the disputed areas as they needed this information in order to secure bargaining instructions from the National Bargaining Council which was scheduled to meet the next day in Indianapolis. Trumka further stated he had authority to negotiate a con-

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[38] The UMWA's strike had failed. A substantial number of the strikers had returned to work, the post-strike complement of employees was substantially greater than the prestrike employment complement and, in comparison to the prestrike period, the Belle Ayr Mine's production had substantially increased.

tract on behalf of the UMWA and felt that the UMWA's new bargaining team would have more flexibility than the previous one because the bargaining position of the UMWA had weakened. Payne replied that he did not feel it was appropriate for Amax to reveal its "bottom line," but he would identify the areas in dispute where the Company felt there was a posibility for compromise and those which the Company felt so strongly about that compromise did not seem likely. In this last category, Payne stated that any contract would have to be self-contained without any memorandum of understanding; be drafted in unambiguous language; include an express no-strike agreement; terminate 3 years from the date of ratification and not in common with the Union's other agreements in the industry; and contain no unlawful clauses. In response to Bank's inquiry, Sulley, for Amax, read off the clauses which Amax claimed were illegal. Regarding the demand for an express no-strike agreement, raised for the first time at this meeting, Trumka explained that within the Union politically this would be impossible for the UMWA to accept inasmuch as historically contracts signed by the UMWA had never contained such a clause. Payne replied that the Company needed protection from the wild-cat strikes which had occurred in its midwestern mines but admitted that no such strike had occurred at the Belle Ayr Mine.

During the meeting while attempting to explore the possible avenues of compromise, Bank asked Payne about the possibility of the UMWA accepting Amax's health and retirement proposal in return for Amax's acceptance of the UMWA's proposed common expiration date. Before Payne could answer, Sulley, an Amax attorney, in effect answered in the negative. He stated: "if we give you a signal or any indication of what we're willing to give, we've failed."

The meeting concluded with the parties agreeing to resume negotiations at Denver, Colorado, on October 21 and 22, 1975.

22. The meetings of October 21–22, 1975[39]

On October 21 and 22, the negotiating teams met in Denver, Colorado. The UMWA negotiators at the start of the meeting indicated that the UMWA accepted Amax's demand that the collective-bargaining agreement be self-contained without any memorandum of understanding. However, they stated that any agreement signed by the UMWA would have to include the UMWA health and retirement proposal and a common expiration date with the UMWA's other agreements in the industry.

All of the disputed items were discussed at length. The parties reached tentative agreement on some items, in a few areas the UMWA indicated it was prepared to make concessions,[40] but the parties remained deadlocked over the great majority of the disputed provisions.

23. The UMWA contract proposal of November 14, 1975

On November 14, 1975, the UMWA transmitted a new contract proposal to Amax accompanied by a written explanation. The new proposal, when compared with the UMWA's July 1 proposal and Amax's current one, made a substantial number of concessions or compromises. The written explanation explained each change and the reason for the change and further explained why the UMWA, in certain major areas, could not accede to Amax's requests. The letter of explanation also noted that the Union was not withdrawing its previous proposal "that all litigation generated by the dispute at the Belle Ayr Mine be dismissed." Also, the proposal itself contained a provision which required that the Company in substance agree to reinstate all striking employees to their former jobs with their original seniority.

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[39] Cairns and Trumka testified about these meetings. In those instances where their testimony does not jibe, I have credited Trumka, who impressed me as the more trustworthy witness.

[40] In one such instance the UMWA negotiators indicated it would amend its contract proposal to require, as proposed by Amax, that idle day work, premium time and overtime be shared within classifications. Nonetheless, when the UMWA thereafter asked Amax to sign off this proposal, it refused.

24. The meeting of November 26, 1975

On November 26, 1975, the negotiating teams met at which time the UMWA further explained its new contract proposal. Amax's negotiators indicated the Company would present a new contract proposal at the next negotiating meeting.

25. The meetings of December 7–8, 1975

The negotiating teams met on December 7 and 8, 1975, in Salt Lake City, Utah, at which time Amax submitted certain modifications to its last contract proposal of March 14, 1975. These changes, in their totality, are *de minimus*. Aside from whether this new proposal includes significant or *de minimus* concessions, the record establishes that in this proposal Amax in effect repudiated former proposals included in its March 14 proposal which the UMWA had agreed to accept (regular overtime pay for military duty leave and birthday holiday leave) and modified another proposal contained in the March 14, 1975 proposal (construction clause) which the UMWA had agreed to accept.

No progress was made during these meetings.

26. The events between December 8, 1975 and February 17, 1976

There was a hiatus in the bargaining between the meetings of December 7–8, 1975 and February 17, 1976, due to the fact that an independent union petitioned the Board for a representation election at the Belle Ayr Mine. The parties suspended negotiations until this petition was dismissed by the Board, at which time the UMWA requested a resumption of the negotiations which resulted in the parties meeting on February 17 and 18, 1976.

27. The meetings of February 17–18, 1976

The UMWA negotiators at the start of these meetings indicated that Amax's March 14 contract proposal, as modified by the one made during the meetings of December 7–8, 1975, was inadequate and the UMWA had ex-

pected more movement in response to its November 14 contract proposal.

The negotiators went over the disputed items and reached tentative agreement on several. In addition, Amax indicated that it would agree to the UMWA's union-security proposal in exchange for Amax's "Enabling Clause" language and made one or two concessions in the area of health and safety.

28. The events from February 18, 1975 to the date of the hearing

There have been no further bargaining sessions since the one held February 18, 1975. The parties have corresponded about the course of bargaining and about specific contract provisions with each party blaming the other for the failure to reach agreement. The strike continues.

C. *Discussion and Ultimate Findings*

1. The failure to comply with Section 8(d)(3) of the Act

The complaint alleges in substance that the UMWA violated Section 8(b)(3) of the Act by striking Amax's Belle Ayr Mine without notifying the Federal Mediation and Conciliation Service (FMCS) as required by Section 8(d)(3) of the Act. In pertinent part, Section 8(d) provides that no party to a collective-bargaining agreement shall modify or terminate such agreement unless the party desiring such termination or modification—

> (1) serves written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . .
>
> * * * * *
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . . .
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given . . . .
>
> * * * * *

The penultimate sentence of this section contains the "loss of status" provision which recites that—

> Any employee who engaged in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9, and 10 of this Act . . . .

The UMWA by its letter of September 10, 1974, notified Amax it desired to negotiate a collective-bargaining agreement to replace the existing one covering the Belle Ayr Mine which was scheduled to expire November 12, 1974. The old agreement was thereafter extended until January 12, 1975, and when no new agreement was reached by that date the UMWA terminated the agreement and commenced a strike against Amax which is still in progress. As of January 12, 1975, the UMWA had not sent written notice to the FMCS about its dispute with Amax involving the Belle Ayr Mine. The only written notices transmitted by the UMWA to the FMCS pursuant to Section 8(d)(3) were the September 11, 1974 and October 17, 1974 letters from UMWA President Miller to FMCS Director Usery. The September 11 letter states, in pertinent part, that the UMWA had notified the signatories of its National Bituminous Coal Wage Agreement of 1971 that the UMWA intended to terminate these agreements. Attached to this letter was a copy of the letter of termination sent by the UMWA to the employer association—the BCOA—which negotiated the National Bituminous Coal Wage Agreement and a copy of a letter of termination sent by the UMWA to the independent signatories of this agreement.[41] It is undisputed that the September 11 letter from Miller to Usery, including its attachments, did not specifically refer to the dispute between Amax and the UMWA involving the Belle Ayr Mine. The October 17 letter from Miller to Usery in perti-

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[41] There is a dispute whether a copy of the termination letter sent to the North American Coal Corporation, a western sub-bituminous coal operator, was attached to the September 11 letter. I have not resolved this question inasmuch as I fail to see its relevance.

nent part states that "in accordance with the requirements of Section 8(d) of the National Labor Relations Act," the UMWA was notifying the FMCS that the UMWA was engaged in negotiations with the signatories to the National Bituminous Coal Wage Agreements of 1971 which the UMWA intended to terminate effective November 12, 1974, and that no new agreement had been reached by the parties. The letter did not refer to the dispute between Amax and the UMWA involving the Belle Ayr Mine.

Based on the foregoing, I find that the UMWA did not give written notice to the FMCS concerning the existence of a contractual dispute between the Union and Amax involving the production and maintenance employees employed at the Belle Ayr Mine. Nor is there evidence that as of January 12, 1975, the UMWA had orally notified the FMCS about the existence of this dispute. The assertion of the UMWA advanced in its post-hearing brief that Yablonski, prior to January 12, 1975, verbally notified officials of the FMCS about this dispute is without support in the record.[42] In view of this I have not considered the UMWA's argument that timely verbal notice from the UMWA to the FMCS about the contractual dispute between Amax and the UMWA satisfied the UMWA's obligation under Section 8(d)(3) of the Act.[43]

Based on the foregoing, I find that by failing to give notice of the existence of a dispute between it and Amax to the Federal Mediation and Conciliation Service as re-

[42] All the record shows is that on or about December 6, 1974, Yablonski told a mediator employed by the FMCS that Yablonski would be the principal negotiator for the UMWA in the contract negotiations involving the western surface mines. There was no mention of the Union's dispute with Amax.

[43] Although Section 8(d)(3), unlike Section 8(d)(1), is not worded in terms of "written notice," the regulations of the FMCS provided that "the notice of dispute filed with the FMCS to the provisions of Section 8(d)(3) . . . shall be in writing." 29 CFR 1402.1 (1971). The Board has never specifically held that the term "notifies" in Section 8(d)(3) means written notification. In *Blue Cab Company*, 156 NLRB 489, cited by the Charging Party, the Board did not have to resolve this issue because the verbal notice involved was not timely within the meaning of Section 8(d).

quired by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of the existing collective-bargaining agreement, pursuant to Section 8(d)(4) of the Act, the UMWA violated Section 8(b)(3) of the Act.

I precluded the UMWA, at the hearing, from calling officials of the FMCS to demonstrate that the FMCS, during the relevant period of time, knew about its dispute with Amax involving the Belle Ayr Mine. Since Section 8(d)(3) by its terms specifically requires that the UMWA notify the FMCS about the existence of this dispute, I rejected the contention of the UMWA that the requirement of Section 8(d)(3) would be satisfied by simply showing that the FMCS had knowledge about the dispute. In its post-hearing brief the UMWA renews this contention, urging that "where mere notice is required, the standard is actual personal knowledge," citing, *Ohio Oil Company*, 91 NLRB 759, and *N.L.R.B.* v. *Vapor Recovery Systems Co.*, 311 F.2d 782 (C.A. 9). These cases, which stand for the proposition that to be effective written notice must be actually received, are inapposite to the question involved herein.

2. Amax's membership or nonmembership in the Peabody Group and if Amax did not join this group, did the UMWA engage in coercive conduct designed to compel Amax to designate the Peabody Group as its representative for the purposes of collective bargaining

a. *Amax's membership or nonmembership in the Peabody Group*

The complaint alleges in substance that the UMWA violated Section 8(b)(1)(B) of the Act by threatening to strike and engaging in a strike to compel Amax to designate a multiemployer bargaining association, the Peabody Group, as its bargaining representative. In deciding this issue it is necessary to answer the threshold question of whether, as contended by the UMWA, Amax designated the Peabody Group as its collective-bargaining representa-

tive. The facts pertinent to this issue, which are set forth in detail, *supra* can be briefly summarized.

The collective-bargaining agreement between the UMWA and Amax covering the Belle Ayr Mine, scheduled to terminate November 12, 1974, was limited solely to that bargaining unit. Amax, in signing this agreement, did not do so as a part of an employer association. Likewise, each of the other coal producers that operate sub-bitumonous and lignite mines in the west, whose employees were represented by the UMWA, were parties to separate, albeit identical, contracts with the UMWA covering separate bargaining units. On November 2, 1974, UMWA's president, Miller, offered to extend each of these agreements until January 12, 1975, if the operators agreed to bargain together as a part of a multiemployer bargaining association. Several of the employers accepted Miller's offer and formed the so-called Peabody Group which designated a single representative to bargain on behalf of its members. Amax was not able to act upon the UMWA's proposal because an independent labor organization had filed a representation petition seeking to represent the employees employed at the Belle Ayr Mine, thus, blocking contract negotiations. The UMWA extended Amax's contract until December 12, 1975, not the full 60 days allowed those employers who joined the Peabody Group. The question concerning representation blocking the negotiations for a new contract at the Belle Ayr Mine resolved itself when UMWA Local 1854 won the representation election, whereupon, by letter of November 23, 1974, Amax's president, Hopper, informed UMWA's president, Miller, that Amax was prepared to begin contract negotiations and stated that he understood that the UMWA "has offered a further extension of the current agreement to January 12, 1975, provided we participate in bargaining with other companies under a single agent selected by such companies." Continuing, the letter states "we are considering participation in such an arrangement providing our understanding of your proposal . . . is correct." After reciting Amax's understanding of the UMWA's proposal, the letter concludes: "if you agree that our under-

standing is in accord with your proposal, please sign below and return a copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation." On December 6, 1974, Miller telegraphed Hopper that he had executed Hopper's November 23 letter of agreement, that contract negotiations between the UMWA and the Peabody Group would start in the middle of December, and that the termination date of Amax's contract was extended until January 12, 1975. On December 10, 1974, Amax's vice president of administration and employee relations, Payne, phoned Yablonski, the UMWA's general counsel and its chief negotiator, and advised him that Amax intended to bargain independently rather than through the Peabody Group. Yablonski voiced no objection and arranged to meet with Payne on December 17, 1974, to discuss matters pertaining to the contract negotiations. This meeting took place as scheduled and, at the start of the meeting, Payne reiterated that Amax had not been able to make satisfactory arrangements with the Peabody Group and as a result intended to bargain independently. Likewise, Amax's corporate vice president for administartion and employee relations, Sonnemann, told Yablonski that Amax wanted it understood it intended to bargain separately for a contract covering the Belle Ayr Mine and the Peabody Group had no authority to bargain for Amax. Yablonski voiced no objection to either Payne's or Sonnemann's statements. The next day, December 18, 1974, Payne wrote Yablonski a letter in which in substance was reasonably calculated to inform Yablonski that Amax intended to negotiate a contract for the Belle Ayr Mine using its own negotiators and did not intend to delegate this authority to the Peabody Group. On December 20, 1975, the negotiations between the Peabody Group and the UMWA commenced. Amax never advised the Peabody Group that it had the authority to bargain on Amax's behalf. Quite the contrary, early in December, Amax informed the Peabody Group that it did not intend to bargain as a part of that group.

The UMWA argues that Amax's letter of November 23, 1974, constitutes an unequivocal intention to be bound in collective bargaining by the Peabody Group rather than through individual action.[44] I disagree. On balance, I am of the opinion, the letter does not evince an unequivocal intent to be bound by group bargaining, rather it indicates that Amax was "considering participation" in the Peabody Group contingent upon two conditions. First, the confirmation that Amax's understanding of the UMWA's proposal was correct and second, Amax's ability to resolve any problems with the Peabody Group pertaining to Amax's participation in that group. The first condition was met when UMWA's president, Miller, signed Amax's letter of November 23. The second condition was never met because Amax, as described *supra*, upon speaking with officials connected with the Peabody Group, promptly notified the UMWA that it was not able to reach a satisfactory understanding with that group, hence, it intended to bargain separately. Under the circumstances, I cannot conclude that Amax's conduct manifested an unequivocal intention to be bound by group bargaining. In any event, assuming that the November 23 letter demonstrates an unambiguous intent to engage in group bargaining, Amax extricated itself from this relationship by making a timely and unambiguous withdrawal from that arrangement. Thus, on December 10, December 17 and December 18, 1974, prior to the start of the collective-bargaining negotiations between the UMWA and the Peabody Group, Amax gave unequivocal notice of its intent to abandon group bargaining through the Peabody Group and to pursue negotiations on an individual basis.[45] For all of these rea-

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[44] The test to be applied in determing if Amax was obligated to bargain through the Peabody Group is whether Amax indicated from the outset in unequivocal intention to be bound in collective bargaining by group rather than individual action. *Custom Colors Contractors*, 226 NLRB No. 120, slip opinion at pages 6–7 and cases cited note. 8.

[45] In *Retail Associates, Inc.*, 120 NLRB 388, 395, the Board set forth the rules governing the withdrawal of an employer or a union from multiemployer bargaining. An employer may withdraw without the union's consent prior to the start of bargaining by giving un-

sons, I find that Amax was not a part of the multiemployer group, known as the Peabody Group, and did not designate that group as its representative for the purpose of collective bargaining.[46]

b. The alleged coercive conduct designed to compel Amax to designate the Peabody Group as its collective-bargaining representative

The complaint alleges that "on or about November 2, 1974, and thereafter, Respondents, by threat of strike attempted to coerce the Employer in its selection of its collective-bargaining representative by offering to extend the existing agreement if the Employer would agree to bargain through an employer-association, the so-called Peabody Group," thus violating Section 8(b)(1)(B).

On November 2, 1974, UMWA President Miller offered to extend Amax's contract termination date from November 12, 1974, to January 12, 1975, provided that Amax agree to designate as its representative for the purposes of negotiating a new collective-bargaining agreement an association of employers known as the Peabody Group. In and of themselves the words contained in Miller's November 2 letter do not constitute restraints or coercion within the meaning of Section 8(b)(1)(B); however, the difference between permissible or coercive language often lies in an analysis of the context in which the words are uttered, e.g., *Local 901, International Brotherhood of Teamsters, etc.* v. *Compton*, 291 F.2d 793, 797 (C.A. 1). Here, pursuant to the UMWA's tradition of "no contract—no work," the Belle Ayr miners could not continue to work when the collective-bargaining agreement terminated. This was common knowledge and the UMWA must have known that Amax was aware of it.

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equivocal notice of its intent to abandon the multiemployer unit and to pursue negotiations on an individual basis.

[46] An additional reason for concluding that Amax did not designate the Peabody Group as its bargaining representative is the fact, as found *infra*, that Amax's letter of November 23 was a product of the UMWA's coercive tactic proscribed by Section 8(b)(1)(B) of the Act.

Under the circumstances, Miller's November 2 letter was reasonably calculated to constitute a none-too-subtle threat to strike Amax immediately upon the termination date of the current agreement if Amax failed to honor the UMWA's request that it designate another employer as its bargaining representative.

The UMWA suggests that the effect of this threat was successfully repudiated by the 30-day extension granted Amax on November 10, 1974, even though it had not agreed to designate the Peabody Group as its bargaining representative. I disagree for the reason that Ed James, an assistant to President Miller, subsequent to Miller's November 2 letter, informed Payne, an Amax official, that if Amax did not agree to join the Peabody Group, as requested by Miller, the UMWA would not extend the current agreement. In the same conversation James left the door open for an extension due to the fact that there was a question concerning the UMWA's status as bargaining representative due to the pendency of the election petition filed by another labor organization. James' remarks were calculated to lead Amax to believe that the reason its current agreement was extended 30 days was related to the question concerning representation caused by the election petition and that otherwise its failure to join the Peabody Group would have resulted in an immediate strike. Also, the fact that Amax only received a 30-day extension, whereas those employers who joined the Peabody Group received an extension of 60 days was calculated to foster this impression. Under these circumstances, the fact that the UMWA extended the termination date of Amax's agreement for 30 days is insufficient to effectively repudiate Miller's threat.

Based on the foregoing, I find that in violation of Section 8(b)(1)(B) of the Act, the UMWA restrained or coerced Amax in the selection of its representative for the purposes of collective bargaining by threatening to strike Amax if it did not designate an association of employers, the Peabody Group, as its representative for the purpose of negotiating a new collective-bargaining agreement.

c. *The alleged strike to compel Amax to join the Peabody Group*

The complaint alleges that the UMWA engaged in its strike against Amax, which commenced January 12, 1975, "in order to compel the Employer to bargain through a multi-employer association," thus, violating Section 8(b)(1)(B), 8(b)(3) and 8(b)(4)(A) of the Act.

The only evidence predating the strike which even colorably demonstrates that the strike was designed to force Amax to select another employer—the Peabody Group—as its bargaining representative is the fact that in an effort to compel Amax to designate the Peabody Group as its representative, the UMWA, as found *supra*, engaged in the coercive tactic of promising not to strike Amax, as scheduled, if it joined the Peabody Group. This is not sufficient, in the circumstances of this case, to prove that the subsequent strike was motivated either in whole or in part by a desire to compel Amax to designate the Peabody Group as its representative for purposes of collective bargaining. The record overwhelmingly establishes that due to the tradition of "no contract—no work" embodied in the UMWA constitution, the strike against Amax would have occurred when it did regardless of whether or not Amax joined the Peabody Group. On January 12, 1975, the UMWA struck all of the western coal operators whose employees it represented, those who were part of the Peabody Group, as well as those who, like Amax, had elected to negotiate independently. Membership in the Peabody Group provided no protection against the strike. There is no evidence that during the strike the UMWA conducted itself in a manner which indicated that an object of the strike was to compel Amax to designate the Peabody Group as its bargaining representative.[47] Under

[47] The UMWA's refusal for over 1 month to negotiate separately with Amax, apart from the Peabody Group, as well as its effort to have Amax sign a contract containing terms and conditions of employment identical to the agreement signed by the Peabody Group, while relevant in assessing whether the UMWA bargained in bad faith, as discussed *infra*, is not persuasive evidence that the strike was motivated by a desire to have Amax join the Peabody Group.

these circumstances, the evidence does not preponderate in favor of a finding that the strike was motivated in whole or in part to compel Amax to designate another employer as its representative for the purposes of collective bargaining. Accordingly, I shall recommend that these portions of the complaint be dismissed.

3. The contract proposals which allegedly require Amax to select another employer as its representative for purposes of collective bargaining

a. *The UMWA health and retirement funds*

The UMWA health and retirement funds, herein called the Funds, provide comprehensive health and retirement benefits to coal miners and their families. The UMWA's contract proposal provided that Amax, on behalf of its employees, contribute to the Funds. The Funds' provision are set out in several documents which are incorporated into the UMWA's contract proposal and are made a part thereof. The Funds' provisions, pertinent to this proceeding, are briefly summarized herein.

The trusts established to administer the Funds are designated as irrevocable trusts under Section 302(c) of the Labor Management Relations Act of 1947, herein called LMRA. They are comprised of three trustees, one "appointed as the representative of the employers," another "appointed as a representative of the Union," and a neutral trustee selected by the others. The trustees' status is defined as that of fiduciaries within the meaning of the Employee Retirement Income Security Act of 1974. They are appointed for at least the duration of the collective-bargaining agreement and may be removed by the party that appointed them only for "cause." They are paid out of the Funds' assets.

The trustees' authority to establish or affect the level of benefits is restricted by the terms of the trust documents. Also, the amount for each category of benefit, the eligibility requirements for each category, the exact level of benefits, and the amount of employer contributions to be allocated to the various classes of beneficiaries are set out

in detail. Nevertheless, the trustees have sufficient discretion so as to significantly affect employees' health and retirement benefits by virtue of their following authority:

(1) They have the power to provide health benefits to any participant receiving pension benefits and who "is not earning more than an amount to be determined by the trustees";

(2) They have the power to provide health benefits to persons who have been "unemployed for a period of time to be determined by the trustees (but in no event for more than 1 year) immediately following the date of termination of such employment";

(3) They have full and final determination as to all issues concerning eligibility for pension benefits;

(4) They have the power to select and set the criteria for "acceptable" insurance carriers and to compel employers to cease doing business with "unacceptable" insurance carriers;

(5) They are empowered to investigate disputed insurance claims;

(6) They have the authority to determine whether employers have violated their contractual obligations and, if so, to pursue legal remedies on behalf of the beneficiaries;

(7) "In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided . . . the benefits may be suspended or reduced to amounts which in the judgment of the trustees, can be paid from assets of the 1974 Benefit Trust";

(8) "Trustees are authorized to promulgate rules and regulations to implement [the pension plan] and those shall be binding on all persons dealing with participants claiming benefits under this plan";

(9) Subject to the Funds' terms and the applicable statutes, "the trustees shall have full authority . . . with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters";

(10) ". . . [T]rustees shall not be limited in their administration of the Trust from [a] providing improved services under changing methods of delivery of health care as long as any such action does not materially increase the cost of the Trust, or [b] taking such other actions which in their best judgment will preserve the financial integrity of the Trust"; and

(11) "The trustees . . . are further authorized . . . to do all acts which they deem necessary or proper and to exercise any and all powers of the Trustees under the [various instruments which establish the Funds] under such terms and conditions as they may deem to be for the best interest for the Trust."

The Funds were already established when the UMWA first proposed that Amax contribute to them, thus, the trustee appointed by the Employer already had been selected and was named in the UMWA's proposal. Amax promptly and repeatedly throughout the negotiations objected to the UMWA's health and retirement proposal on several grounds, one of which was that it had no voice in the selection of the employer trustee.[48] Nevertheless, the UMWA, as described in detail *supra*, insisted to a point of impasse, with strike pressure, that Amax agree to a collective-bargaining agreement which included this proposal. The complaint alleges that the Respondents violated Section 8(b)(1)(B) and 8(b)(3) of the Act in that they "adamantly insisted on the inclusion of Pension and Health

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[48] The Funds' management trustee was designated by employers whose mines are covered by the National Bitumonous Coal Wage Agreement of 1974, a multiemployer bargaining unit represented by the Bitumonous Coal Operators Association (BCOA). Since Amax is a member of the BCOA and its midwestern mines are covered by the National Bitumonous Coal Wage Agreement of 1974, Amax had a voice through its membership in the BCOA in the selection of the Funds' management trustee. Here, Amax, however, is negotiating with the UMWA for a contract covering its western mine, a separate bargaining unit. Accordingly, if the Funds' trustees are representatives for the purposes of collective bargaining, 'Amax is entitled to have the sole voice in the selection of its representative free from impermissible restraint or coercion.

and Welfare Trust Provisions, by the terms of which the trustees . . . would not be selected by the employer."

There are few matters more properly the mandatory subject of collective bargaining than the UMWA's proposal that Amax contribute moneys into a program to furnish Amax's employees with health and retirement benefits. Likewise, insofar as this proposal established a procedure to administer the program which, as described *supra*, significantly affects the employees' terms and conditions of employment, it is also a mandatory subject of bargaining. The administration of the program, however, includes the designation of a management trustee, not selected by Amax, thus, the question for decision is whether the Funds' trustees, who are appointed by the UMWA and the Employers, to administer the health and retirement program, are "representatives for the purpose of collective bargaining" within the meaning of Section 8(b)(1)(B) of the Act. If so, the UMWA violated Section 9(b)(1)(B) and 8(b)(3) of the Act, as alleged in the complaint, by insisting to a point of impasse, with strike pressure, that Amax agree to a collective-bargaining contract which includes the UMWA's health and retirement program.[49] See *Metropolitan District Council of Philadelphia, etc. (McCloskey and Company)*, 37 NLRB 1583, 1584.

The Board has not resolved the question for decision. Although the question was raised by the General Counsel in *Roofers Local 220 (Jones & Jones, Inc.)* 177 NLRB 632, 649-651 (1969), the case was neither litigated nor briefed on that theory, thus, the Board did not pass on the ques-

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[49] I recognize, as the UMWA points out, that the complaint does not allege that the UMWA struck over the disputed issue but simply alleges that the UMWA "adamantly insisted" that Amax agree to the disputed proposal. However, the purpose of the strike was fully litigated in connection with this and other allegations of the complaint. Accordingly, assuming *arguendo* that the complaint does not allege conduct which constitutes restraint or coercion within the meaning of Section 8(b)(1) of the Act (but see *Sheet Metal Workers International Association Local Union No. 59*, 227 NLRB No. 90), the matter has been fully litigated.

tion. See, also, *Carpenters Local 964 (Contractors Association of Rockland County)*, 181 NLRB 948, 952 (1970), where the Administrative Law Judge, in concluding that the selection of employer trustees was a nonmandatory subject of bargaining, said in *dicta* that the trustees there might be viewed as employer representatives. However, no Section 8(b)(1)(B) allegation was litigated in that case. Likewise, the decision of the Administrative Law Judge adopted without comment by the Board in *Roofers Local No. 36 (Jones & Jones, Inc.)*, 172 NLRB 2248, 2251 (1968), is not dispositive of the question presented. There, without citing precedent or setting forth a rationale, the Administrative Law Judge found that a respondent-union violated Section 8(b)(1)(B) by insisting that an employer accept trustees, not appointed by the employer, as its representative in the administration of what appears to have been a Section 302(c) trust fund. However, the comments of the Administrative Law Judge made in *Roofers Local 220, supra*, at 650, about *Roofers Local 36*, which were adopted by the Board, coupled with the lack of precedent or rationale for the *Roofers Local 36* decision, indicate that its value as a precedent is limited.

Since the Board has not resolved the question of whether the trustees involved in this case are representatives for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B), I shall examine court decisions which have dealt with (1) the duties and responsibilities of trustees who administer trusts pursuant to Section 302(c) of the LMRA and with (2) the question of whether a union's role in the administration of a Section 302(c) trust is of a different order than its duties as bargaining representative. I shall also examine Board decisions involving the question of whether trustees who administer Section 302(c) funds are agents of one or both or none of the parties that have appointed them. Finally, I shall examine the Employee Retirement Income Security Act of 1974 (ERISA) to determine its impact, if any, upon the duties and responsibilities of the trustees involved in this proceeding.

I

Paragraphs (a) and (b) of Section 302 of the LMRA make it unlawful for any employer to offer, or any representative to accept, money or other things of value. Paragraph (c) lists five exceptions to these broad prohibitions. The last one exempts payments to a trust fund established for the purpose of paying health and retirement benefits to the employees and their dependents, provided that the basis for such payments is specified in a written agreement between the Union and the Employer and that "employees and employers are equally represented in the administration" of the Funds "together with such neutral persons as the *representatives* of the employer and the *representatives* of the employees may agree upon . . . ."[50] [Emphasis added.] In cases involving the duties and obligations of the employer and union "representatives," the Courts have uniformly construed this portion of the statute to mean that they occupy the position of trustees who are fiduciaries rather than collective-bargaining representatives.

In *Blankenship* v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971), a case involving the Funds' immediate predecessor, the District Court rejected the contention that "representatives of labor or management may properly operate

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[50] The term "representative" is defined in the Act as including "any individual or labor organization." See Sections 29 USC Section 142(3) and Section 152(4). Thus, the description of the trustees in Section 302(c) as "the representatives" of the parties that appoint them does not reveal whether Congress, in using this phraseology, intended to indicate that the trustees appointed by the unions and employers to trusts governed by 302(c) are "representatives for purposes of collective bargaining." An examination of the LMRA reveals that such a severely restricted construction of "representative" would be inapplicable to that term as it is used in other sections of the Act. This circumstance, plus the context in which "representative" is used in Section 302(c), convinces me that Congress, in describing the trustees as "representatives" of the parties that appoint them, did not mean to suggest that they are "representatives for purposes of collective bargaining" as that term is used in Section 8(b)(1)(B) of the Act. Cf. *U.S.* v. *Ryan*, 350 U.S. 299 (1956).

the Fund, so as to give their special interests collateral advantages." The Court explained:

> . . . there is nothing in the LMRA or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining. Indeed, the statute under which the 1950 Fund is organized was designed expressly to isolate such welfare funds from labor-management politics. (*Id.*, at 1094.)

The Court pointed out this standard requires that any differences between the employer or union "representatives" must concern only "what is best for the beneficiaries," and not what would benefit their appointing parties:

> . . . on these matters, trustee representatives of the Union and the operators may have honest differences in judgment as to what is best for the beneficiaries. Congress anticipated such differences in enacting Section 302(c) of the LMRA, and sought to temper them by the anticipated neutrality of the third trustee. *The congressional scheme was thus designed not to alter, but to reinforce "the most fundamental duty owed by the trustee": the duty of undivided loyalty to the beneficiaries.* 2 Scott on Trusts § 170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held. (*Id.* at 1095.) [Emphasis added.]

After a lengthy consideration of the case, the Court found a variety of breaches of fiduciary duty and as a part of the equitable relief granted, removed two of the trustees and enjoined the trustees. Thereafter, the UMWA requested the Court to remove the new trustee, Carey, on the ground that he would not seek "to implement the wishes and the programs of the membership." The Court declined, finding that the trustee's duty was to the beneficiaries and not to the UMWA and that unless a breach of fiduciary duty could be shown, the trustee could not be removed. *Lamb* v. *Carey*, 498 F.2d 789, 794 (C.A.D.C.

1974). Subsequently, the trustee evinced an attitude and behavior which showed that he "harbors intense antagonism towards the [UMWA's] present management." *Id.* at 795. The UMWA renewed its petition for removal and the District Court removed the trustee. The Court of Appeals upheld the removal on the ground that communication between a trustee and the party that appoints the trustee is essential to informed decisions in the best interests of the beneficiaries. The Court stated:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. However, the District Court on March 15, 1973, made the unchallenged finding that "[c]lose collaboration with the [UMWA] is required in an atmosphere of mutual confidence to further the objectives and the effectiveness of the Fund". This places an even more stringent requirement on the actions of a Union trustee, a requirement which is here of crucial importance.
>
> Of course, this does not mean that the [UMWA] may replace its trustee merely because it dislikes him. In its Opinion and Order . . . the trial court noted that:
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> > "If the [UMWA] desires changes in benefits or changes in the administration of the Fund, it can make its wishes known to the trustees who will consider such suggestions in a deliberate fiduciary atmosphere . . . . The very nature of the Fund, however, is such that its integrity will be undermined if the [UMWA] is given the unilateral right to remove the Union trustee whenever dissatisfaction or differences prompted by personality or political differences prompt the [UMWA's] management to seek a change."
>
> Equally true, it does not mean that the Court can remove a Trustee whenever the [UMWA] expresses dissatisfaction. (*Lamb* v. *Carey* at 793–794.)

The only other court to deal definitively with the question of trustee loyalties is the Ninth Circuit Court of Appeals. In *Toensing* v. *Brown*, 528 F.2d 69 (C.A. 9, 1975),

the Court followed the rationale of the *Blankenship-Lamb* decisions and held, in substance, that, although trustees may take into account the recommendations of the collective-bargaining parties if they have information "pertinent to effective administration of the fund," those recommendations may be adopted and implemented only to the extent that they are consistent with the interests of the beneficiaries of the trust. The Court in this regard stated:

> The trustees acted properly in considering the benefit increases recommended by the collective bargaining parties. Indeed, they would have violated their fiduciary duty had they ignored information pertinent to effective administration of the Fund.
>
> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under § 302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory. (*Id.* at 72.)

* * * * *

II

In 1974, prior to the start of the contract negotiations involved in this case, Congress passed a comprehensive pension reform law called the Employee Retirement Income Security Act of 1974 (ERISA). The UMWA health and retirement funds are regulated by the provisions of ERISA and, as previously described, the status of the Funds' trustees is defined as that of fiduciaries within the meaning of ERISA. ERISA requires that the Funds' trustees act solely for the benefit of the Funds' participants (a potential beneficiary) and beneficiaries and subjects derelict trustees to civil liability and removal. Section 404(a)(1), 29 U.S.C. Section 1104(a)(1) provides:

> Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

Specifying this duty, Section 406(b)(2), 29 U.S.C. Section 1106(b)(2) requires:

(B) A fiduciary with respect to a plan shall not—

* * * * *

(2) in his individual or in any other capacity, act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . . .

The purpose of this section was explained by the Joint House Conference Report in these terms:

> This prevents a fiduciary from being put into a position where he has dual loyalties, and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries. H.R. Rep. No. 93, 93d Cong., 2d Sess., 1280.

Also, a trustee who represents the interests of his principal, in violation of his duty to trust beneficiaries, is personally liable for damages and subject to removal under Section 409(a) of ERISA, 29 U.S.C. Section 1109(a). Furthermore, under Section 405 of ERISA, 29 U.S.C. Section 1105, a trustee has a positive duty to prevent his counterpart from acting in the interests of his own principal.

In view of the foregoing provisions of ERISA, the following comment appearing in the UMWA's post-hearing brief is singularly appropriate:

> Trustees subject to ERISA are the antithesis of collective bargaining representatives. Collective bargaining representatives are required to represent the interests of their principals. Trustees under ERISA are severely penalized if they do. Collective bargaining representatives are penalized if they do. Collective bargaining representatives are penalized if they

interfere when their counterparts act in behalf of their own principles. Trustees under ERISA breach their duty if they do not interfere. No greater dichotomy could be imagined.

III

The Funds' trustees' role as fiduciaries, governed by the stringent regulations imposed by ERISA, convinces me they are not representatives for purposes of collective bargaining. I recognize that, in the administration of the Funds, the trustees possess the authority to decide matters which are of vital importance to the employees, the Union and the employers. I also recognize that in resolving these matters the trustees may represent the interest of the parties who appoint them, to the extent that this can be done without compromising their fiduciary responsibility to the Funds and its beneficiaries. Stated another way, the trustees may take into account recommendations of the collective-bargaining parties insofar as the recommendations include information "pertinent to the effective administration of the Fund[s]," but these recommendations may be adopted and implemented only to the extent they are consistent with the fiduciary obligation the trustees owe the beneficiaries of the Funds. Therein lies the reason why the trustee appointed by the UMWA and the one appointed by the employers are not representatives for purposes of collective bargaining. Their fiduciary status makes it legally impossible for them to represent their principals for purposes of collective bargaining as contemplated in Section 8(b)(1)(B) of the Act. A primary attribute of individuals who act as bargaining representatives is that they owe undivided allegiance to the union or employer that appoints them and are bound to follow the instructions and act in the interest of their principals. The trustees involved in this case, however, are required by law and by the terms of the UMWA's proposed collective-bargaining agreement to act exclusively in the interest of the Funds' beneficiaries regardless of the consequences to the UMWA or the employers. The trustees are required to consider the recommendations of the employers and the

UMWA in "a deliberate fiduciary atmosphere," not in the give-and-take atmosphere of the bargaining table. Moreover, the Funds' trustees differ in other crucial respects from collective-bargaining representatives because of the fiduciary duty they owe to the Funds' beneficiaries. The trustees may be removed from their position as "representatives" of the parties only for a breach of their fiduciary duties, rather than because their principals are dissatisfied with their representation, and they are paid out of the Funds' assets rather than by the parties that appointed them.

Based on the foregoing, I conclude that the Funds' management trustee is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the Act. This conclusion is supported by Court and Board decisions which have implicitly recognized that trustees who administer trust funds, like the ones involved in this case, do not act as representatives for purposes of collective bargaining.

In *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971), the Supreme Court indicated that "the Union's role in the administration of the fund [referring to a trust fund created under Section 302(c)] is of a far different order from its duties as collective bargaining agent."

In *Miniard* v. *Lewis*, 387 F.2d 864 (C.A.D.C. 1967), cert denied 393 U.S. 873, an employee alleged that the trustees of the predecessor to the Funds involved in this case had breached their duty of fair representation, imposed by the Act upon unions, by excluding him from the Funds' coverage. See *Vaca* v. *Sipes*, 385 U.S. 895 (1967). The Court held there was no such duty:

> The allegation is founded on a union's duty to represent, equally and without discrimination, the interest of all employees in the bargaining unit. Even though the Fund here resulted from bargaining between the employer and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the Trustees' duties are those

> of fiduciaries because as *Trustees* they perform separate functions and do not act as representatives of either employers or the union. (*Id.* at 865, n. 5.) [Emphasis in the original.]

In *N.L.R.B.* v. *Carpenters' Local 1913 (Fixtures Unlimited)*, 531 F.2d 424 (C.A. 9), the Court ruled that the trustees of a qualifying fund were not agents of the collective-bargaining parties for the purpose of remedying violations of the Act. There, the Board, finding that the trustees were agents of the respondent-union, ordered the trust to accept payment and administer the proceeds of a backpay order.[51] The Court held that the trust agreement, on its face, established no such agency relationship: "An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust. . . ." *N.L.R.B.* v. *Carpenters' Local 1913*, *supra*, at 426. The Court ultimately affirmed the Board's order, but on the ground that acceptance by the trustees of the backpay contributions from the respondent-union, on behalf of the discriminatee, would not be inconsistent with their fiduciary duty and otherwise would not violate Section 302 of the LMRA. *Id.* at 426.

The courts have also held that Section 301 of the Act, which confers jurisdiction in suits for violations of collective-bargaining agreements, does not confer such jurisdiction in cases involving allegations that trustees have breached a trust agreement. See *Bowers* v. *Moreno*, 520 F.2d 843, 845 (C.A. 1) ("The Court had no jurisdiction over employer trustees under Section 301 of the LMRA of 1947, since they were not, in this context representatives of the employers"). See, also, *Beam* v. *International Organization of Masters, Mates and Pilots, et al.*, 511 F.2d 975, 978 (C.A. 2).

Lastly, the Board in cases involving the administration of trust funds has consistently found that "the trustees of

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[51] The Board found that the trustees, including the employer-appointed one, were agents of the respondent-union. *United Brotherhood of Carpenters and Joiners of America Local No. 1913, AFL-CIO, et al. (Fixtures Unlimited)*, 213 NLRB 363, note 1.

a trust fund which has been provided for by the collective bargaining agreement are agents of each of the parties to such agreement." *L & M Carpet Contractors, Inc.*, 218 NLRB 802, n. 1, citing *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al. (Turner-Brooks, Inc.)*, 161 NLRB 229, 234. See, also, *Jacobs Transfer, Inc.*, 227 NLRB No. 181, slip opinion at pages 4-5, and *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, et al. (Fixtures Unlimited)*, 213 NLRB 363 note 1, modified on this point 531 F.2d 424 (C.A. 9). Obviously, a person who acts as a representative for the purposes of collective bargaining cannot act as an agent for both the employer and the union, hence, implicit in these Board decisions is the recognition that in the administration of a trust fund created by a collective-bargaining agreement, the trustees are not representatives for purposes of collective bargaining.[52]

Based on the foregoing, I shall recommend the dismissal of the portion of the complaint alleging that Respondents violated Section 8(b)(1)(B) and 8(b)(3) in that they "adamantly insisted on the inclusion of Pension and Health and Welfare Trust Provisions, by the terms of which the trustees . . . would not be selected by the employer."

b. The Joint Western Surface Mining Industry Training Committee

The complaint alleges that the Respondents violated Section 8(b)(1)(B) and 8(b)(3) of the Act by adamantly insisting that Amax agree to that part of the UMWA's contract proposal creating a Joint Western Surface Industry Training Committee, herein called the Western Industry Training Committee, which the complaint further alleges to be a nonmandatory subject of bargaining providing for collective-bargaining representatives not selected by

[52] The cited cases involve the conduct of trustees covered by provisions in a collective-bargaining agreement. The instant situation is no different. The Funds' provisions are contained in various benefit and pension plans and trusts, all of which are specifically incorporated into the collective-bargaining agreement and made a part thereof.

Amax. The training provision challenged by the complaint was first proposed in the UMWA's January 27, 1975 contract proposal and reads as follows:

ARTICLE XV

TRAINING

Section (a) Priority

The parties agree that the establishment of effective training programs for Employees is essential to safe and efficient production of coal. Toward that end there shall be established a Joint Western Surface Mining Industry Training Committee which shall consist of 3 representatives appointed by the United Mine Workers of America and 3 representatives of the industry, appointed by the Employers. This committee shall meet primarily for the purpose of fostering and promoting the advancement of effective training in the industry.

The Joint Western Surface Mining Industry Committee will give special attention to the problems of Employers operating three (3) or fewer mines and aid in devising training programs for these companies that will permit them to institute effective training programs without imposing undue hardships.

The International Union and the Employers shall each assign a trained representative to devote full time as long as needed to assist the Joint Western Surface Mining Industry Training Committee and the Employers signatory hereto in developing and implementing the various training programs provided for herein.

The remainder of Article XV, section (b) through (f), sets forth the "various training programs" referred to in section (a), lists minimum standards for each program and specifically provides that each program "shall be developed by [Amax]."

The Western Industry Training Committee is also referred to in Article III, section (c)(2), which deals with health and safety matters and which was first included in

the UMWA's January 27, 1975 contract proposal. It reads as follows:

Article III

Health and Safety

* * * * *

Section (c) Mine Health and Safety Committee

* * * * *

(2) The Union and Employer shall jointly establish and fund a course of health and safety training for members of the Mine Health and Safety Committee, which is designed to improve health and safety knowledge and skills. The Mine Health and Safety Committee shall participate in and shall be paid at their regular rates of pay by the Employer for attendance at training sessions. The training program shall be established by the Joint Western Surface Mining Industry Training Committee.

* * * * *

The remainder of section (c) of Article III describes the Mine Health and Safety Committee and describes its functions. In substance it provides that Local 1854 will establish such a committee at the Belle Ayr Mine composed of miners employed at the mine who shall inspect the mine for unsafe working conditions, make findings and recommendations to Amax about such conditions, and hold monthly meetings with management to discuss health and safety problems.

The parties did not adduce evidence describing the manner in which the Western Industry Training Committee functions. Thomas Betell, who is a staff representative for the Joint Industry Training Committee established pursuant to the training provisions included in the National Bituminous Coal Wage Agreement of 1974, testified on behalf of the UMWA about the manner in which that committee functions. However, the training committee involved in this case, the Western Industry Training Committee, is different than the Joint Industry Training Committee, described by Betell, and its existence is based upon the provisions of a different collective-bargaining

agreement. Indeed, Betell testified that his work did not involve him with the Western Industry Training Committee and admitted he was not even sure whether this committee had been established. Under these circumstances, Betell was not competent to testify about the Western Industry Training Committee, and I have not considered his testimony.

The UMWA's contract proposal concerning the Western Industry Training Committee, as set forth in Article XV(a) of the contract as described *supra*, remained a part of the UMWA contract proposal from January 27, 1975, until July 1, 1975, when it was changed to read: "The parties agree that the establishment of effective training programs for employees is essential to safe efficient production of coal. The International Union and Amax shall each assign a trained representative in developing and implementing the various training programs provided for herein." But, Article III(c)(2) of the UMWA contract proposal, as described *supra*, remained unchanged throughout the negotiations.[53] In sum, for a period of 5 months the UMWA engaged in a strike for a contract which included the disputed provision, Article II(a), involved herein. When the subject of the Western Industry Training Committee was first brought up by the UMWA at the meeting of January 6, 1975,[54] Amax's negotiators stated the Company wanted no part of this committee and indicated it would not agree to the establishment of a committee whose employer representatives were not selected by Amax. During the remainder of the negotiations Amax

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[53] The complaint does not contest the UMWA's conduct connected with Article II(c)(2), rather it specifically challenges Article II(a). Under the circumstances, I have not considered whether the UMWA's conduct in connection with Article III(c)(2) was illegal but have considered the language of this article only insofar as it is helpful in deciding whether the UMWA's conduct in connection with Article II(a) was impermissible.

[54] The subject of the Western Industry Training Committee was discussed at the meeting of January 6 even though the provision for the committee did not appear in the UMWA's contract proposal until January 27, 1975.

never altered this position and in its several contract proposals between January 27 and July 1, 1975, refused to accept such a committee as proposed by the UMWA.

I am of the view, even assuming the UMWA bargained to impasse and exercised restraint or coercion in connection with its demand that Amax sign a contract incorporating the disputed Western Industry Training Committee,[55] evidence is insufficient to establish a violation of Section 8(b)(1)(B) and 8(b)(3) as alleged in the complaint.

The provision—Article II(a)—creating the Western Industry Training Committee, insofar as it establishes employees' training programs, is acknowledged by the parties to this proceeding to be a mandatory subject of bargaining, thus, the UMWA would not violate the Act merely by insisting to an impasse that Amax agree to a contract which incorporated this provision. The UMWA loses its right to insist to an impasse about this matter only if, as alleged in the complaint, the presence of management members on the Western Industry Training Committee limits Amax "in the selection of [its] representatives for the purposes of collective bargaining," for if it does, insistence to a bargaining impasse upon the inclusion of this provision would constitute a refusal to bargain within the meaning of Section 8(b)(3) of the Act, and striking to obtain Amax's agreement to the inclusion of the provision would constitute a violation of Section 8(b)(1)(B) of the Act. *Metropolitan District Council of Philadelphia, etc. (McCloskey Co.)*, 137 NLRB 1583, 1584. The issue, therefore, is whether the management members of the Western Industry Training Committee, who are selected by employers other than Amax, are representatives for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B) of the Act. I am persuaded they are not representatives for purposes of collective bargaining for the following reasons.

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[55] For the reasons set forth, *supra*, in connection with the UMWA's contractual health and retirement proposal, I reject the UMWA's defense that the 8(b)(1)(B) allegation should be dismissed because the complaint does not plead impermissible "restraint or coercion."

The Western Industry Training Committee, as described, *supra*, in Article II(a) of the UMWA contract proposal, was created to encourage and promote the advancement of training programs for the employees employed in the western surface coal mines, particularly for the smaller employers, and to assist the employers to develop and implement the several training programs set forth in section (b) through (f) of Article II. These sections of Artical II enumerate a minimal standard for the various training programs and specifically provide that each program "shall be developed by [Amax]." In other words, the committee is not engaged in collective-bargaining negotiations or the administration of the collective-bargaining agreement, rather its function is to advise Amax and other employers about employees' training programs. The employers are free, however, to disregard this advice. This is indicated by the fact that Article II(a) is worded in terms of the committee giving aid or assistance to the employers and provides that each employer shall develop its own program.[56] Under these circumstances, I do not view the UMWA's contractual demand involved herein as one involving an employer's selection of his representative for the purposes of collective bargaining, for the function of this committee is not to negotiate or administer a collective-bargaining agreement, but is more in the nature of a panel of knowledgeable persons empowered to give advice on only one type of problem, which advice the Em-

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[56] In this regard Article III(c)(2) is ambiguous. It starts by stating that "The Union and [Amax] shall jointly establish . . . a course of health and safety training for members of the Mine Health and Safety Committee," but ends stating that this committee's training program "will be established by the [Western Industry Training Committee]." The ambiguity of Article III(c)(2), when viewed in the light of Article II(a) wherein the Western Industry Training Committee was created and granted authority only to act in an advisory capacity, leads me to conclude that it is unrealistic to interpret Article III(c)(2) as giving more power to the committee than it was endowed with by the article which establishes its authority. In any event, as noted previously, the complaint does not place into issue the legality of Article III(c)(2), only Article II(a).

ployer does not have to accept.[57] It is in this significant respect that prior Board cases cited by the General Counsel and the Charging Party[58] are distinguishable from the instant situation.

Based on the foregoing, I shall recommend that the complaint be dismissed insofar as it alleges that, in violation of Section 8(b)(1)(B) and 8(b)(3), Respondents have "adamantly insisted on the inclusion of the following training clause [Article XV, section (a)] which is a nonmandatory subject of bargaining and provides for representatives not selected by the Employer."

c. *The district agreements*

The enabling clause of the UMWA's contract proposal, Article I, among other things, includes a provision dealing with district agreements which the UMWA continued to propose until its contract proposal of November 14, 1975. This proposal in substance states that any collective-bargaining agreement entered into between the parties would carry forward and preserve the several district agreements "executed between the UMWA and the various employers," subject to the terms of the parties' collective-bargaining agreement. Amax had never entered into any such district agreement covering the Belle Ayr Mine.

The Charging Party contends that this contract proposal encompasses a nonmandatory subject of bargaining inasmuch as it requires Amax to accept the terms of agreements negotiated by other employers. In other words, the evidence establishes the Union bargained to impasse over a contract proposal which, if accepted, would in effect

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[57] The fact that the committee is established to advise about only one particular problem—the development of training programs—provides further support for the inference that the management members are chosen to provide information, not advocacy.

[58] *Federated Employers of Nevada*, 135 NLRB 462, 470–471; *Metropolitan District Council of Philadelphia, etc. (McCloskey & Co.)*, 137 NLRB 1583; *Local 264, Laborers (D & G Construction Co.)*, 216 NLRB 40.

have required Amax to designate another employer as its collective-bargaining representative. I disagree because the record establishes that the Union made it perfectly clear to Amax that it was not the intent of this language to require Amax to abide by agreements negotiated by other employers. On February 25, 1975, the first negotiation meeting at which the parties apparently discussed the meaning of the disputed provision, Edelman, at the request of Amax's negotiator, Cairns, furnished Amax with copies of the several district agreements and told Cairns that, since Amax was not a party to any of these agreements, they would have no effect on Amax.[59] Thereafter, at the next bargaining session, held on March 7, 1975, Edelman in effect repeated that the UMWA, in proposing the district agreement language, did not intend that Amax be required to abide by any one of these agreements and indicated that the UMWA was willing to reduce this to writing in the form of a memorandum of understanding.

Based on the foregoing, I am not persuaded that the record preponderates in favor of a finding that the UMWA offered the district agreements' language in the enabling clause with the intent of having Amax abide by the terms of agreements negotiated by other Employers. Accordingly, insofar as the complaint alleges that the Respondents violated Section 8(b)(3) of the Act by bargaining to an impasse over the aforesaid district agreements' language, I shall recommend that it be dismissed.

4. The contract proposals which allegedly contain nonmandatory bargaining subjects

a. *The "coal lands clause" and "enabling clause"*

The complaint placed in issue the question of whether Respondents violated Section 8(b)(3) of the Act by adamantly insisting that Amax accept a contract which required

[59] This apparently did not come as any surprise to Amax for the district agreement language was included in its recently expired contract covering the Belle Ayr Mine, and there is no evidence that during the term of that agreement the UMWA took the position that the Belle Ayr Mine was covered by any one of the district agreements.

it to recognize the UMWA as the exclusive collective-bargaining representative of the miners employed by Amax in its western mines other than the Belle Ayr Mine (paragraph 17(d) and (g) of the amended consolidated complaint).

Article I, entitled "Enabling Clause" and section (f) of Article II, entitled "Application of this Contract to the Employer's Coal Lands," which were included in the UMWA's first contract proposal of January 6, 1975, in pertinent part, read as follows:

> Article I, Enabling Clause
>
> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].
>
> Article II
>
> (f) . . . this agreement covers the operation of all the coal lands, coal producing, and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

These proposals remained unchanged, in pertinent part, until the UMWA's contract proposal of July 1, 1975, which added a proviso to the above-described "Enabling Clause" which required that the UMWA must be "the bargaining representative of the employees of the Employer at such mines," and added a similar proviso to the above-described "coal lands clause" which required that "the Union establishes its status as the representative of a majority of the employees at such mine or facility." The next and final change in these proposals was made by the UMWA in its contract proposal of November 14, 1975, at which time the UMWA notified Amax that the "coal lands clause," to which Amax took strong objection has been deleted in its entirety." The above-described "Enabling Clause" was changed at this time to read:

> This agreement covers [Amax's] Belle Ayr Mine and all Other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation

> facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this agreement, or which may hereinafter (during the term of this agreement) be put into production or use on the leases attached hereto as Addendum A.[60]

In connection with this particular proposal, the UMWA in its letter of explanation to Amax stated:

> . . . the UMWA has agreed to the concept that the proposed Agreement should pertain to the Belle Ayr Mine only. However, the Union feels very strongly that the Belle Ayr Mine comprises any mining which will be done on the present leases held by Amax in Campbell County, Wyoming [the site of the Belle Ayr Mine]. Therefore, the language of Article I has been restructured to insure that although the agreement will apply only to the Belle Ayr Mine, the UMWA will obtain jurisdiction of all new operations on those leases.

Amax, as indicated above, voiced strong objections to the above-described "coal lands clause" and "enabling clause." During the first meeting of the parties' bargaining teams held on January 6, 1975, Amax's negotiators objected to the UMWA contract proposal insofar as it covered Amax's facilities other than the Belle Ayr Mine. On January 9, 1975, this objection was reduced into writing by Payne, Amax's chief negotiator, in a hand-delivered letter to Yablonski, the UMWA's spokesperson. Yablonski answered the same day, by letter, stating: "Your assertion that the UMWA has attempted to bargain for Amax operations other than Belle Ayr is plainly without foundation. The standard UMWA accretion clauses—known as 'Application of contract to coal lands'—merely commits an employer who agrees to it to apply the terms of that agreement to any new mining operation which may be developed during the life of the agreement if the UMWA is either recognized or certified as the collective bargaining

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[60] The reference to "the leases attached hereto as Addendum A," as explained in the UMWA's letter of explanation which accompanied the November 14, 1975, contract proposal, are those leases which establish the Belle Ayr Mine.

agent of that operation." Thereafter, during one of the negotiating meetings held the week of February 13, 1975, UMWA negotiator Edelman informed Amax's negotiators that the UMWA was willing to execute a memorandum of understanding stating that its proposed "coal lands clause" would only apply in those situations where the employees employed at the new operation.

During the period from January 6, 1975, to the UMWA's November 14, 1975 contract proposal, Amax objected to the "coal lands clause" and the "enabling clause." It voiced its objections directly by stating them at the negotiation meetings and indirectly by offering contract proposals which completely omitted the disputed provisions. The UMWA for a period of over 11 months, January 6, 1975 until November 14, 1975, demanded that the Company sign a contract which included the disputed proposals, and on January 12, 1975, struck in support of a contract which included them. I find that by the time of its contract proposal of February 27, 1975, and possibly as early as January 12, 1975, the UMWA had bargained to a point of impasse with Amax over the disputed provisions and this impasse continued until the UMWA advanced its November 14, 1975 contract proposal.[61] I recognize the UMWA did not specifically state it was conditioning the signing of a complete agreement upon the inclusion of the disputed clauses. However, as I have found previously, the record establishes that the UMWA for a period of at least 8 months, in the face of Amax's continued opposition, insisted to the point of impasse that Amax accept the disputed contract proposals. This continued insistence, against the opposition of Amax, amounts to a refusal to bargain as to mandatory subjects of bargaining, if the disputed contract provisions are nonmandatory subjects of

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[61] Amax always made it clear that its objection to the disputed language was based on the requirement that Amax would have to apply the terms of the collective-bargaining agreement to facilities in the west which it operated other than the Belle Ayr Mine. In these circumstances, the UMWA's modification of the disputed language made in its July 1, 1975 contract proposal did not break the bargaining impasse.

bargaining. *District 50, United Mine Workers of America, etc. (Central Soya Company, Inc.)*, 142 NLRB 930, 939.[62]

The essential question presented for decision, whether the above-described "enabling clause" and "coal lands clause" constitute mandatory or nonmandatory bargaining subjects, is one of first impression. These clauses, which are sometimes referred to as "after acquired" or "additional facility" clauses are common to collective-bargaining agreements and the Board has held they are not proscribed by the Act but are valid contractual provisions, regardless of whether they specifically provide that the employees of the "after acquired" or "additional facility" must designate the union as their exclusive bargaining representative. *Houston Division of the Kroger Co.*, 219 NLRB 288. The Board has not decided whether such clauses are mandatory subjects of bargaining. I am of the opinion, for the reasons set forth herein, that these clauses are nonmandatory subjects of bargaining.

Unlike wages, hours and other terms and conditions of employment, questions concerning the scope of a certified bargaining unit are not mandatory subjects of bargaining. *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, 415 F.2d 440, 444-445 (C.A. 5). Under the statutory scheme, the resolution of such unit disputes does not normally occur within the framework of collective bargaining but, rather, is governed by Section 9 of the Act, which confers upon the Board exclusive authority to resolve such disputes through hearing and election procedures. Thus, it is unlawful for an employer or union to insist that employees included in a certified or recognized unit be excluded from an agreement's coverage, or to insist that the agreement

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[62] Also see *National Fresh Fruit & Vegetable Company, et al.*, 227 NLRB No. 293, where the Board enunciated the controlling factors used to determine whether one party to contract negotiations has unlawfully insisted to the point of impasse that the other party accept a nonmandatory bargaining subject. Throughout this Decision, in evaluating the evidence to determine whether the UMWA bargained to a point of impermissible impasse, over its several alleged nonmandatory and illegal contract proposals, I have been guided by the principles enunciated in the aforesaid decision.

set working conditions for employees who are not in the unit. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666–667; *N.L.R.B.* v. *South Atlantic Longshoremen's Ass'n*, 443 F.2d 218, 220 (C.A. 5); *Douds* v. *International Longshoremen's Ass'n*, 241 F.2d 278, 282–283 (C.A. 2), and *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, *supra*, 415 F.2d at 444–445. An employer's bargaining obligation "extends only to the 'terms and conditions of employment' of the employer's employees' in the 'unit appropriate for such purposes' that the Union represents." *Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 164. As the Second Circuit Court of Appeals explained in the *Douds* case:

> The process of change not permitted by the Act is one that denies the Board . . . ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3). (241 F.2d at 282–283.)

In short, while an employer and a union agree to merge separate bargaining units for the purpose of negotiations, such enlargement of the bargaining unit is not a mandatory subject of bargaining. Neither party may insist to the point of impasse that the negotiations in the certified unit be extended to other units.

The record here establishes that during the instant negotiations the UMWA pursued to a point of impasse in bargaining, with strike pressure, an objective which necessarily required Amax to conduct negotiations on a basis broader than the certified unit. The necessary effect of the disputed "coal lands clause" and "enabling clause," if accepted by Amax, was to force its negotiators to bargain about the wages and other terms and conditions of employment of employees employed at facilities, other

than the Belle Ayr Mine, which Amax might operate in the west during the term of the agreement, thus, in effect merging the Belle Ayr Mine into a company-wide bargaining unit.[63] This conduct, for the reasons given previously, contravenes the obligation to bargain in good faith imposed by the Act.

The UMWA argues, however, that the above-described principles of law should not be applied here because the disputed clauses seek "to preserve the jobs and work standards for the Belle Ayr miners by removing the economic incentive for Amax to develop other mines (with substandard nonunion wages, hours and other terms and conditions of employment) at the expense of the Belle Ayr miners," hence, since the disputed clauses vitally affect the unit employees the clauses are mandatory subjects of bargaining, citing, *Local 24 Teamsters* v. *Oliver*, 358 U.S. 283 (1958), and *Chemical Workers, Local 1.* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 179 (1971). In further support of its position, the UMWA points out that "a union may adopt a uniform wage policy and seek vigorously to implement it," *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665, and that the disputed clauses also "seek to set the stage for coalition bargaining," which type of bargaining has been recognized "as a lawful and legitimate union objective," citing, *AFL-CIO Joint Negotiating Committee for Phelps Dodge* v. *N.L.R.B.*, 459 F.2d 374 (C.A. 3), and *U.S. Pipe and Foundry* v. *N.L.R.B.*, 298 F.2d 873 (C.A. 5).

Concededly, the employees and their bargaining representative at the Belle Ayr Mine may have an interest in consolidating the Belle Ayr contract negotiations with those of other western mines that Amax will eventually

[63] The UMWA takes the position that, "although there are apparent similarities between the coal lands clause and multi-unit bargaining," the record does not establish "multi-unit bargaining" was an object of the disputed clauses. I disagree. I can think of no clearer expression of a demand for an employer to engage in "multi-unit bargaining" as when, as here, a union demands that the employer sign an agreement covering one bargaining unit which contains a clause stating that "this agreement covers" the employer's other bargaining units.

operate. But there is also a competing public interest in avoiding industrial strife and disruption to the process of collective bargaining which is likely to flow if the UMWA is permitted to press its own interests in obtaining agreement in one bargaining unit over the terms and conditions of employment to be applicable generally to other separate bargaining units not even yet in existence. In this situation the public interest embodied in the statute far outweighs the UMWA's interest. The Act, as described *supra*, mandates that issues relating to the nature and size of bargaining units are not to be determined by economic pressures, but rather by the orderly and peaceful procedures provided for in the Act. See *Douds* v. *International Longshoremen's Ass'n*, 241 F.2d 278, 282-283 (C.A. 2). This does not mean that the UMWA must entirely foresake all efforts toward obtaining uniformity in working conditions between the Belle Ayr Mine and other western mines Amax may operate, or that all forms of mutual aid or support between these different bargaining units are unlawful. The cases cited by the UMWA, *supra*, clearly demonstrate this much. But the UMWA cannot justify its conduct here in terms of those cases. For what was at issue in those cases simply does not involve the sort of collision with the paramount statutory policy of preserving the integrity of a bargaining unit from disruptive attack. Thus, the decision of the Supreme Court in *Pennington* demonstrates that the goal of "uniformity of labor standards" is not a sacrosanct absolute which can be pursued without regard for the more important public policies reflected in legislation. Although in *Pennington* the conflict was with a prohibition of the Sherman Antitrust Act, the Court took pains to point out, in terms meaningful to this case, that the national labor policy also places restrictions on a union's pursuit of uniformity:

> . . . There is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions for other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit

> leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with favored employers. (381 U.S. at 666.)

Likewise, the *Oliver* case did not involve the juxtaposition of a union's interest in uniformity of working conditions with the integrity of a recognized or certified bargaining unit. Indeed, the Supreme Court in subsequently reaffirming that Oliver stood for the proposition that when the terms of employment of persons outside of a bargaining unit "vitally affects" the terms and conditions of employment of unit employees, they are mandatory subjects of bargaining, was careful to point out that "this is not to say that application of *Oliver* . . . turns only on the impact of a third party [the extra-unit employees] matter on employee interests. Other considerations . . . may be equally important." *Chemical Workers, Local 1* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 179, note 19.

The other cases cited by the UMWA similarly turn on principles which cannot be extended to the different circumstances presented here. The facts in this proceeding are significantly distinguishable from those in the *Phelps Dodge* case in which the Court set aside the Board's finding of an 8(b)(3) violation. In that case the union involved sought common contract expiration dates and simultaneous settlements of all contracts. But separate negotiations were conducted at each company's unit and no bargaining was conducted at any unit with regard to employment conditions at other locals. The only case relied on by the UMWA which might be regarded as creating an exception to the general rule that proposals to expand the scope of the bargaining unit are not mandatory subjects of bargaining is the *U.S. Pipe and Foundry* case. There, the issue, as the Court stated it, was "whether by prearrangement among themselves, each of three unions, certified representatives of three separate plant bargaining units, simultaneously negotiating separate contracts with

the same employer, may insist as a condition to its agreement that all three contracts under negotiations shall expire on a common date." 298 F.2d at 877. In holding that the unions might legitimately insist on a common expiration date, the Court pointed out that "[w]ithout a common expiration date, any union striking for a new contract on a different date might have to 'bail with a sieve' while the employer shifted its production activities to the other plant or plants." 298 F.2d at 877. However, it is plain that the Court was dealing only with a request for a common expiration date and nothing more. The Court could well have viewed the request "realistically" (298 F.2d at 877) as representing merely an *"apparent"* rather than a *"real"* expansion of the scope of the bargaining unit (298 F.2d at 878). For there was no showing, such as is present in the instant case, that the unions involved were demanding agreement in one bargaining unit of terms and conditions of employment to be applicable generally to other bargaining units. Indeed, as the Court said, "a common expiration date for all three contracts vitally affects the ability of *each* union *separately* to bargain [emphasis added] (298 F.2d at 878)."

Based on the foregoing, I find that during the contract negotiations for the Belle Ayr Mine, the Respondents, over the objections of Amax, insisted to a point of impasse that Amax agree to contractual provisions which are nonmandatory subjects of bargaining insofar as, if accepted, they would require Amax to bargain with Respondents about the wages and other terms and conditions of employment of employees employed in bargaining units other than the Belle Ayr Mine. Accordingly, Respondents violated Section 8(b)(3) of the Act as alleged in the amended complaint.

On November 14, 1975, as described in detail *supra*, the UMWA withdrew the "coal lands clause" from the bargaining table and with respect to the disputed portion of the "enabling clause" submitted new language. In this last regard, the UMWA's letter of explanation, set out in full *supra*, notified Amax that the Union had agreed "to the

concept that the proposed agreement should pertain to the Belle Ayr Mine only, "but that the new language incorporated into the "enabling clause" was drafted so that the UMWA would have jurisdiction over all operations upon the leases which establish the Belle Ayr Mine. The "enabling clause," as reworded on November 14, 1975, is set out in full, *supra*, and can be reasonably construed in this manner. In any event, it is sufficiently ambiguous so as to preclude any finding that its acceptance by the Company would have obligated the Company to apply the collective-bargaining agreement to facilities which were not part of the Belle Ayr Mine. In other words, the record does not establish that the "enabling clause," as modified by the contract proposal of November 14, extended the proposed contract to other bargaining units. Accordingly, I shall recommend dismissal of the part of the amended consolidated complaint which alleges that Respondents violated Section 8(b)(3) by adamantly insisting that Amax accept this provision.

b. *The dismissal of litigation proposal*

The complaint in substance alleges that Respondents conditioned the reaching of a collective-bargaining agreement upon Amax's withdrawal of the lawsuits and unfair labor practice charges it had filed against Respondents, thus, violating Section 8(b)(3) of the Act. The pertinent facts can be briefly summarized.

The matter of the withdrawal of litigation was brought up for the first time on April 10, 1975, when the UMWA telegraphed Amax rejecting its March 14, 1975 contract offer and notified Amax that the UMWA's last contract proposal remained unchanged except for three new proposals, one of which was the "dismissal of all litigation." On July 1, 1975, the UMWA submitted a new contract proposal with an attached memorandum of understanding which incorporated into the agreement several items, one of which was entitled "Dismissal of Litigation" and reads:

> As a further consideration for the execution of the Agreement and this memorandum of understanding, it is agreed that both parties hereto will promptly

seek the dismissal of all litigation arising from their dispute at the Belle Ayr Mine, which is pending before any state or federal court or before the National Labor Relations Board.

The UMWA's next and last contract proposal submitted on November 14, 1975, did not include a memorandum of understanding, nor was the "Dismissal of Litigation" provision included in the body of the agreement. However, the UMWA's written explanation which accompanied the proposal to Amax, among other things, states "we do not withdraw our proposal that all litigation generated by the dispute at the Belle Ayr Mine be dismissed."

During the course of the negotiations involved herein, the proposal that the parties dismiss or withdraw all litigation was mentioned or discussed only once, at the bargaining sessions which took place August 7–8, 1975. Yablonski for the UMWA, at that time, reminded Amax's negotiators there had been no discussion about the UMWA's proposals involving the reinstatement of strikers and the dismissal of litigation. In reply, Amax's negotiators stated the Company felt that since the parties were apart on so many issues of substance, it would be premature to discuss those questions. Yablonski did not press the matter any further.[64] In other words, there is no evidence that Amax objected to the UMWA's "Dismissal of Litigation" proposal.

The UMWA's contract proposal that Amax withdraw the lawsuits and unfair labor practice charges filed against the UMWA is a nonmandatory subject of bargaining. *N.L.R.B.* v. *Local 964 United Brotherhood of Carpenters and Joiners of America*, 447 F.2d 643, 646 (C.A. 2). The Act permits either of the parties, in collective bargaining, to propose and negotiate about nonmandatory subjects of

[64] I have considered and rejected Cairns' testimony, given on cross-examination, that "the union . . . did insist that we drop our litigation as the price of a contract." Cairns did not place this alleged statement of the Union's position in its context nor did he testify whether it was a written or verbal statement and, if the latter, when it was made and by whom. He did not, when he testified about this matter, impress me as trustworthy witness.

bargaining, but it forbids them to insist to impasse upon such matters. *N.L.R.B.* v. *Wooster Division of Borg-Warner*, 356 U.S. 342. The crucial issue presented here for decision is whether the UMWA's treatment of its "Dismissal of Litigation" proposal—a nonmandatory subject of bargaining—should be characterized as a "proposal" or an "insistence to impasse." I am persuaded the record does not establish that the UMWA insisted to impasse on this nonmandatory subject of bargaining. Amax never voiced any kind of an objection—let alone an explicit and unequivocal objection—to the proposal. *Union Carbide Corporation*, 165 NLRB 254, enf'd, 405 F.2d 1111 (C.A.D.C.), and, generally, see *National Fresh Fruit & Vegetable Company, etc.*, 227 NLRB No. 293. Under these circumstances, I find that the General Counsel has failed to prove that Respondents bargained to an impasse on this nonmandatory subject of bargaining, and, accordingly, shall recommend that this part of the complaint be dismissed.

c. The exemptions clause; the 1950 pension trust; the exclusion of Local 1854

The Charging Party takes the position that Respondents violated Section 8(b)(3) of the Act by insisting to the point of impasse that Amax agree to the following contract proposals which the Charging Party contends are nonmandatory subjects of bargaining: the 1950 pension trust; the exemptions clause; and the exclusion of Local 1854 as a party to the contract. None of these proposals are specifically alleged in the amended consolidated complaint as nonmandatory subjects of bargaining which Respondents insisted upon to a point of impasse. The Charging Party urges that this allegation is encompassed within the broad allegation of paragraph 17(k) of the complaint, which as amended during the hearing reads as follows:

> Respondent has refused to bargain in good faith with the Employer, has engaged in surface bargaining, has negotiated with the Employer in bad faith, has exhibited a predetermined resolve not to agree to any proposal but their own, and *has insisted upon in-*

cluding nonmandatory and unlawful clauses in any collective bargaining agreement. [Emphasis added.]

The Charging Party's argument must be evaluated in the light of the circumstances surrounding this amendment to the complaint.

The complaint, at the start of the hearing, in pertinent part alleged that Respondents violated Section 8(b)(3) by adamantly insisting to an impasse that Amax agree to certain nonmandatory and illegal contract proposals and, in this regard, either quoted the offending clause in *haec verba* or described the portion of the contract proposal involved. Neither the exemptions clause nor the 1950 pension trust fund, nor the clause dealing with the exclusion of Local 1854 as a party to the contract were named or otherwise referred to in the complaint as constituting nonmandatory or illegal subjects of bargaining. Also, the complaint did not allege overall bad-faith bargaining by the Respondents, rather, paragraph 17(k) alleged in substance that Respondents engaged in bad-faith surface bargaining "*in that* Respondents have exhibited a predetermined resolve not to agree to any proposal but their own [emphasis added]." During the first 2 days of the hearing the Charging Party attempted to adduce evidence with respect to contract proposals offered by the UMWA which it contended were illegal or nonmandatory bargaining subjects, but were not alleged as such in the complaint. Respondents objected and, during on-and off-the-record discussions with the parties, I made it clear that, in view of the multitude of issues involved in this proceeding, in an effort to make absolutely sure Respondents knew what they were defending against, I intended to strictly limit the Charging Party and the General Counsel to the aliegations of the complaint and would make no findings with respect to whether contract proposals were nonmandatory or illegal subjects of bargaining if they were not specifically alleged as such in the complaint (Tr. 102–103). Likewise, in connection with the Charging Party's effort to adduce evidence, over the objections of Respondents, to

prove that Respondents had engaged in overall bad-faith bargaining, I made it clear to the litigants that, as I viewed them, the pleadings did not allege such a violation, but simply alleged Respondents had engaged in bad-faith table bargaining by virtue of one type of conduct, namely, "in that Respondents have exhibited a predetermined resolve not to agree to any proposal but their own." Thereafter, toward the end of the 2nd day of the hearing, the General Counsel moved to amend the complaint to include additional illegal and nonmandatory bargaining subjects which, as in the case of the already alleged illegal and nonmandatory contract proposals, the General Counsel spelled out in *haec verba* or were otherwise identified. The disputed contract proposals involved herein were not included in this amendment even though the General Counsel had previously been placed on notice that I would make no Section 8(b)(3) or Section 8(b)(4)(A) findings based upon so-called nonmandatory or illegal contract clauses if they were not specifically pleaded in the complaint. The General Counsel also moved to amend paragraph 17(k) of the complaint, as described in detail *supra*, so as to allege overall bad-faith bargaining. It was not my intention in granting this motion to amend, over the Respondents' objection, to allow the General Counsel or the Charging Party to use paragraph 17(k) as a vehicle to search the record at the conclusion of the hearing and urge that certain contract proposals not specifically named in the complaint were nonmandatory subjects which the UMWA had insisted upon to an impasse in violation of Section 8(b)(3) of the Act. Quite the contrary, when the amendments were offered and received, I made it clear to the parties, on and off the record, that the amendment to paragraph 17(k) was being allowed only so far as it broadened that allegation to place into issue the contention that Respondents had engaged in overall bad-faith bargaining (Tr. 303–307).

In view of the aforesaid circumstances, I find that the question of whether the contract proposals involved herein constitute nonmandatory bargaining subjects, and,

whether the parties bargained to an impasse over any one of them, was not within the scope of the amended and consolidated complaint. It is plain that, because of my rulings made at the hearing, respondents were led to believe that such matters were not being litigated and were not afforded an opportunity to fairly litigate such matters. For these reasons I have not considered the Charging Party's contention that the Respondents violated Section 8(b)(3) of the Act by insisting to an impasse that the Company agree to the aforesaid contract proposals.

I realize that evidence pertaining to Respondents' bargaining position taken with respect to the disputed proposals was received into evidence in connection with the allegation that Respondents "exhibited a predetermined resolve not to agree to any proposal but their own." This does not establish that the question of whether these proposals constitute nonmandatory bargaining subjects over which Respondents bargained to a point of impasse was fully litigated. This is not simply a situation wherein a respondent was not placed on notice by the terms of the complaint that it was required to defend itself against charges that certain contract proposals were nonmandatory subjects of bargaining, rather it involves a situation where a respondent during the course of a hearing, after objecting to the receipt of evidence pertaining to certain contract proposals not alleged as illegal or nonmandatory contract proposals, was specifically assured by the Administrative Law Judge that he would make no findings that a clause was either a nonmandatory or illegal bargaining subject unless it was specifically pleaded as such in the complaint. Thereafter, the General Counsel was permitted to amend the complaint to allege additional contract clauses as illegal or nonmandatory bargaining subjects but failed to include the disputed clauses in his amendment. Under these circumstances, to say that the question of whether the disputed clauses were nonmandatory subjects of bargaining insisted upon by the Respondents to an impasse was fully litigated would be to deny Respondents a fair trial.

5. The contract proposals which allegedly violate Section 8(e) of the Act

a. The "successorship clause"

The UMWA included a provision in the collective-bargaining agreement that it proposed which would have required Amax to make any sale or conveyance of the operations covered by the agreement conditional upon the successor's assumption of Amax's obligations under the agreement. The complaint in substance alleges that the "successorship clause" is proscribed by Section 8(e) of the Act, hence, Respondents violated Section 8(b)(3) of the Act by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) of the Act by engaging in a strike where an object thereof was to require Amax to agree to a contract which included the "successorship clause."

The "successorship clause" reads as follows:

> This Agreement shall be binding upon all signatories hereto and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The "successorship clause" was included in the UMWA's first contract proposal of January 6, 1975, and in the succeeding ones of January 27, 1975, February 26, 1975, and July 1, 1975. The clause was not included in Amax's first contract proposal of January 6, 1975, and at the negotiation meeting held on that date Amax objected to its inclusion in the UMWA's proposal. Thereafter, Amax included the clause in its contract proposal of January 11, 1975, February 18, 1975, and March 14, 1975. Subsequently, at

the negotiating meetings held July 21-22, 1975, Amax's negotiators objected to the clause, explaining to the UMWA's negotiators that the Board's General Counsel had recently challenged the clause's legality. This objection was renewed by Amax during the next negotiating meetings held August 7-8, 1975. The UMWA, despite Amax's objection, did not withdraw the "successorship clause" until November 14, 1975. Indeed, the UMWA on August 18, 1975, in effect informed Amax that the UMWA's contract proposal of July 1, 1975, which included the clause, remained unchanged and broke off negotiations with Amax until October 9, 1975, based on its belief that the negotiations had reached an impasse. On November 14, 1975, shortly after the resumption of the negotiations, a new contract proposal was submitted by the UMWA from which the "successorship clause" was deleted, with the following explanation: "Although the UMWA is confident of the legality of the successorship clause, the Union understands the strong objections of Amax to the concept of successorship and his withdrawn its proposal in the interests of reaching agreement."

The terminology, "operations covered by this agreement," in the "successorship clause," covers not just the Belle Ayr Mine, but, as described in the previous section dealing with the "coal lands clause" and "enabling clause," covers all of the western coal lands and facilities owned, operated or leased by Amax as of the date of the agreement's execution, or which Amax acquired during the term of the agreement which were "put into production or use," provided that the UMWA establishes its status as majority representatives of the employees employed at such mines or facilities.[65]

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[65] The proviso concerning the UMWA's representative status was not included in its initial contract proposals but the record establishes that the UMWA at all times intended that the extension of the agreement to Amax's western facilities, other than Belle Ayr Mine, was conditioned upon the UMWA's acquisition of majority status. Yablonski and Edelman early during negotiations, on separate occasions, in effect so informed Amax's negotiators.

Amax, as found *supra*, operates several mines in the midwest, not covered by the contract negotiations involved in this case, but operates only one western mine, the Belle Ayr Mine. However, Amax owns or leases substantially more parcels of coal land than those which make up the Belle Ayr Mine and its midwestern mines. Amax continually purchases coal lands but "seldom sells" coal lands, rather it continually trades coal lands which it owns or leases for coal lands owned or leased by other coal producers. The reason for this is that, since many of the parcels or coal leases acquired by Amax are small and noncontiguous, it is essential for Amax to trade these parcels for others in order to put together a large enough contiguous block of land to support a "viable mining plan," one which will enable Amax to use its land to produce coal. In this regard, the record establishes that Amax does not use its coal lands to produce or process coal unless the area is large enough to support 15 or 20 years of mining operations. It is a fair inference, from the aforesaid circumstances, that Amax's trading of its coal lands involves noncontiguous parcels not used by Amax to produce or process coal since they do not constitute a "viable mining plan." It is also a fair inference that coal lands which constitute a viable mining plan such as the parcels which comprise the Belle Ayr Mine and other facilities which are being used to produce or process coal are seldom if ever traded by Amax.

General Counsel and Charging Party, relying upon the Board's decision in Commerce Tankers,[66] contend that the "successorship clause" violates Section 8(e) of the Act because the limitations placed on the transactions covered by the clause are encompassed within the "cease doing business with any other person" language of that section of the statute, and the clause cannot be viewed as "primary" under *National Woodwork*.[67] Thus, by insisting to im-

[66] *National Maritime Union of America, AFL-CIO; Commerce Tankers Corporation*, 196 NLRB 1100, enfd. 486 F.2d 907 (C.A. 2).

[67] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

passe that Amax agree to this clause and by striking for a contract which included this clause, General Counsel and Charging Party contend, Respondents violated Section 8(b)(3) and 8(b)(4)(A) of the Act as alleged in the complaint. In opposition, the Respondents, relying upon *National Woodwork*, contend the "successorship clause" is "primary" in character, rather than "secondary," and, in any event, it does not constitute an agreement to cease "doing business" within the meaning of Section 8(e) of the Act, citing *Cascade Employers Assn.* [68] and *Harris Truck.*[69] Also, Respondents urge the evidence is insufficient to establish that the UMWA bargained to an impasse over the disputed clause.

In agreement with Respondents, for the reasons set out herein, I conclude that the "successorship clause," if agreed to by Amax, would not require Amax to cease "doing business" within the meaning of Section 8(e) of the Act, and, in any event, the clause is "primary" in character.[70]

The Board in a series of recent cases—*Cascade Employers Assn., supra, Harris Truck, supra,* and *Bader Brothers* [71]—held that successorship clauses virtually identical to the one involved here are not encompassed within the literal meaning of Section 8(e) because the limitations placed on transactions covered by this type of a clause are not encompassed within the "cease doing business with any other person" language of that section of the statute. The instant case is not significantly distinguisha-

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[68] *International Union of Operating Engineers, Local No. 701 (Cascade Employers Association),* 221 NLRB 751.

[69] *District No. 71, International Association of Machinists and Aerospace Workers (Harris Truck and Trailer Sales),* 224 NLRB No. 10.

[70] In view of this conclusion, I have not considered Respondents' further argument that their conduct is not violative of Section 8(b)(3) because the evidence fails to establish bargaining about the "successorship clause" had reached a point of impasse.

[71] *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bader Brothers Warehouses, Inc.),* 225 NLRB No. 78.

ble from these cases. Contrary to the General Counsel and the Charging Party, I do not view *Commerce Tankers, supra,* as precedent for the conclusion that the "successorship clause" is unlawful under Section 8(e). In *Commerce Tankers,* the contracting employer, Commerce, despite a successorship clause in its contract with the National Maritime Union (NMU), attempted to sell its last steamship, the S.S. Barbara, to another shipping company without securing an undertaking from this company to honor the NMU's collective-bargaining agreement. It was in this context the legality of the successorship clause involved in that case was litigated. The Board concluded the sale of the S.S. Barbara constituted "doing business" within the meaning of Section 8(e) for the reason that the sale of vessels, such as the S.S. Barbara, in the maritime industry was not a noval situation but a fairly common occurrence in the normal course of "doing business." 196 NLRB at 1100–1101. In the instant case, although Amax normally trades coal lands, the disputed successorship clause, as I have found *supra,* does not cover property traded by Amax but is limited to lands used by Amax which are rarely, if ever, traded. Under these circumstances, the instant case is not governed by *Commerce Tankers,* rather it is governed by the Board's decisions in *Harris Truck* and *Cascade Employers Assn.* and *Bader Brothers.*

Assuming, however, the "successorship clause" reaches the kind of transaction which constitutes "doing business" within the meaning of Section 8(e) of the Act, I am of the opinion that the clause is designed to protect the interest of the unit employees, thus, it is still not proscribed by Section 8(e). Thus, in a case involving a successorship clause which provided that if all or part of the Employer's operation was transferred, the operation would continue to be the subject of the terms of the Employer's collective-bargaining agreement, the Board held that the clause did not run afoul of Section 8(e). *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bader Brothers Warehouses, Inc.),* 225 NLRB No. 78. In *Bader Brothers,* the Board found that the objective of the successorship clause

was the protection and preservation of the jobs of the unit employees, and that there was no evidence that the clause was aimed at fostering the union's own organizational interests distinct from the unit employee's job security.[72] *Bader Brothers*, 225 NLRB No. 78, slip opinion at pages 12–14. The successorship clause in dispute in this case is identical, in pertinent respects, to the one involved in *Bader Brothers*. Likewise, there is no evidence that the clause was aimed at fostering the UMWA's own organizational interests as distinct from the unit employee's job security.[73] Accordingly, for the reasons set forth in *Bader Brothers, supra*, I find that the objective of the disputed successorship clause is the protection of bargaining unit work, thus, it is not proscribed by Section 8(e) of the Act.

Based on the foregoing, I shall recommend that the allegations of the complaint which pertain to the "successorship clause" be dismissed in their entirety.

c. *The "leasing-licensing out clause"*

The UMWA in its first contract proposal submitted on January 6, 1975, included a provision entitled "Leasing, Subleasing and Licensing Out of Coal Lands," herein called the "leasing-licensing out clause," which reads as follows:

> The employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this agreement or any section, paragraph or clause thereof.
>
> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted un-

[72] In so concluding, the Board noted that its decision in *Harris Truck* constituted an alternate ground for concluding that the clause was not proscribed by Section 8(e). *Bader Brothers*, 225 NLRB No. 78, note 1.

[73] In *Cascade Tankers, supra*, relied upon by the General Counsel and the Charging Party, there was extrinsic evidence which established that the successorship clause was being used to foster the union's own organizational interests.

> less the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

The complaint alleges in substance that the "leasing-licensing out clause" is proscribed by Section 8(e) of the Act, hence, Respondents violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this clause.

Amax's negotiators during the negotiating meeting held on January 6, 1975, objected to the "leasing-licensing out clause." Immediately thereafter Amax incorporated the clause into its contract proposal of January 11, 1975, and February 18, 1975, but deleted the clause from its contract proposal offered March 14, 1975.[74] The UMWA included the disputed clause in its contract proposal of January 27, 1975, and February 26, 1975, but in its next proposal of July 1, 1975, deleted the second paragraph in its entirety and continued to propose the first paragraph for the remainder of the negotiations.

I find the record demonstrates Respondents insisted to impasse that Amax accept the "leasing-licensing out clause" and that one of the objects of their strike against Amax was to require Amax to sign a contract which included this clause. I recognize that up until March 4, 1975, Amax, by its conduct, of incorporating the disputed clause into its contract proposal, indicated it was not opposed to this part of the UMWA's proposal. However, after ob-

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[74] Amax's negotiators on March 4, 1975, in effect withdrew the "leasing-licensing out clause" from their proposed contract when they objected on that date to this clause.

jecting on March 4, 1975, that the clause was illegal, Amax deleted it from its March 14 contract offer. This conduct amounted to an unequivocal signal to the UMWA that Amax objected to this provision. Nevertheless, the UMWA did not withdraw the "leasing-licensing out clause" nor did it indicate it intended to withdraw it from the bargaining table, but instead, on April 10, 1975, informed Amax it was rejecting Amax's March 14 offer and that the Union's last contract proposal remained unchanged. It is plain that at this point the parties had reached an impasse over the disputed clause, which impasse was not broken until July 1, 1975, when the UMWA deleted a significant part of the clause. Indeed, in their post-hearing brief Respondents concede that "the disputed clause was at impasse for a maximum of three months."

General Counsel and Charging Party contend the "leasing-licensing out clause" is an impermissible "union signatory" agreement proscribed by Section 8(e), thus, by insisting to impasse that Amax accept this clause and by striking for a contract which includes this clause, Respondents violated Section 8(b)(3) and 8(b)(4)(A), as alleged in the complaint. Respondents take the position these allegations should be dismissed because the disputed clause does not come within the scope of Section 8(e) and, even if 8(e) is applicable, the clause is "primary."

Respondents, citing *Harris Truck*, *supra*, and *Cascade Employers*, *supra*, contend that "the transactions covered by the leasing-licensing out clause do not constitute 'doing business' within the meaning of Section 8(e) of the Act." I disagree. The Board and the courts have consistently interpreted the interruption of a relationship between either a lessor-leasee or licensor-licensee as within the ambit of the statutory phrase "cease doing business." See *Retail Fruit & Vegetable Clerks* v. *N.L.R.B.*, 249 F.2d 591, 595 (C.A. 9). Indeed, "the phrase 'doing business', would ordinarily cover doing any business which the third party is free to discontinue . . . . The phrase, 'cease doing business', is general . . . ." *Id.* at 595. However, in *Cascade Employers*, *supra*, and its progeny, after an examination

of the legislative history of Section 8(e) and the need to accommodate that section of the statute with other relevant sections, the Board concluded that so-called successorship clauses, which deal with situations wherein it was contemplated that the "employing industry" would remain the same after a business transfer, did not contemplate a cessation of business within the intent of Section 8(e) of the Act. The Board concluded that, as contemplated by a successorship clause, the sale or transfer of an enterprise in whole or part "is generally viewed not as a business transaction, but as a substitution of one entity for another while the conduct of business continues without interruption." *Harris Truck, supra,* 224 NLRB No. 10, slip opinion at page 9. In other words, the cases cited by Respondents are limited to successorship clauses. The "leasing-licensing out clause" in dispute here does not remotely resemble a successorship clause. No evidence was adduced to establish that the UMWA intended for the clause to operate in the manner of a successorship clause. Quite the contrary, the UMWA's proposed contract contains a separate "successorship clause," discussed *supra,* which is strong evidence that the "leasing-licensing out clause" was not intended to serve as one. In these circumstances, I reject Respondents' defense that "the transactions covered by the leasing/licensing clause do not constitute 'doing business' within the meaning of Section 8(e) of the Act."

As the Supreme Court explained in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 633–634, Section 8(e) was intended to supplement the existing prohibitions against secondary boycotts. It does not prohibit all union-employer agreements which may have the incidental effect of a cessation of business with other employers. Rather, Congress intended that Section 8(e) would embody the same distinction between lawful primary and unlawful secondary boycott activity contained in Section 8(b)(4). *Id.* at 623–639. Accordingly, a collective-bargaining agreement violates Section 8(e) if its "tactically calculated to satisfy union objectives elsewhere," rather than to forward the interests of the

employees within the unit. *Id.* at 644–645. Guided by these principles, I find that the second paragraph of the "leasing-licensing out clause" is, and the first paragraph is not, proscribed by Section 8(e) of the Act.

The first paragraph is addressed only to the actions of the signatory employer and the interests of the unit employees. It secures an agreement that the signatory employer will not transfer coal lands by lease, sublease or license where "the purpose thereof is to avoid the application of this Agreement." On its face the first paragraph is designed to prevent the erosion of the contract bargaining unit by a series of licensing or leasing agreements and, as such, it "is addressed to the labor relations of the contracting employer vis-a-vis his own employees," (*National Woodwork, supra,* at 645) hence it is not proscribed by Section 8(e) of the Act.

The second paragraph violates Section 8(e) because, for two separate reasons, it is an explicit "union signatory" agreement. Firstly, the clause in effect permits subcontracting only to employers who recognize the UMWA. The phrase "abide by the terms of this Agreement" covers union recognition as well as other terms of the agreement proposed to Amax by the UMWA. *Local 437, International Brotherhood of Electrical Workers (Dimeo Construction Co.),* 180 NLRB 420. Secondly, the provision permits the subcontracting only to employers who employ UMWA members. *A. Duie Pyle Inc.* v. *N.L.R.B.*, 383 F.2d 772, 777–778 (C.A. 3); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 (Carnation Company),* 181 NLRB 882, 886; *Meat & Highway Drivers, etc., Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 717 (C.A.D.C.). The law is settled that contract provisions like the one in dispute herein, which require or encourage a boycott of companies who do not have union contracts or employe union members, violate Section 8(e) because such a clause promotes the union's interest, "independent of the interests of the employees being represented, in furthering [the Union's] own organizational ends in protecting the interests of its other bargaining units." *N.L.R.B.* v. *Na-*

tional Maritime Union of America (Vantage Steamship), 486 F.2d 907, 913 (C.A. 2). Or, as the Board, with the approval of the Circuit Court of the District of Columbia has phrased it: "Where an object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *Commerce Tankers Corporation, supra*, 196 NLRB at 1101, and *Meat & Highway Drivers, etc., Local 710* v. *N.L.R.B., supra*, 335 F.2d at 716. In sum, the disputed clause insofar as it allows contracting out only to companies who employ UMWA members and who abide by the terms of the UMWA-Amax collective-bargaining agreement, does not meet the *National Woodwork* test of being "addressed to the labor relations of the contracting employer vis-a-vis his own employees," rather it is calculated to control the labor relations of other employers and the collective-bargaining representation of other employees. Therefore, it is inescapably secondary in its aim and, thus, violates Section 8(e).

Respondents adduced no testimony that the intent of the disputed clause is to protect unit work or union standards. In any event, such testimony would have been irrelevant where, as here, the contractual provision on its face manifests a secondary object. For, "if the meaning of the clause [at issue] is clear, the Board will determine forthwith its validity under 8(e)." *General Teamsters, Local 982 (J.K. Barker Trucking Co.)*, 181 NLRB 515, 517, enfd. *sub nom., Joint Council of Teamsters No. 42* v. *N.L.R.B.*, 450 F.2d 1322; see, also, *Dimeo Construction Company, supra*, 180 NLRB at 421. The General Counsel is not required, in such a case, to prove further that such a secondary object was actually intended: "The contract must be tested by its terms." *Truck Drivers Local 413* v. *N.L.R.B.*, 334 F.2d 539, 542 (C.A.D.C.).

Respondents urge that the provision which requires that work shall be performed by members of the UMWA does not run afoul of 8(e) because it is merely a requirement that the licensee or leasee employ laid-off bargaining unit employees. The provision, however, does not say this

either directly or by implication and I cannot agree with Respondents' further contention that the provision is "ambiguous." I realize that it allows licensing out "if the work involved is performed by members of the UMWA *in the manner and to the extent permitted by law* [emphasis added]," and I have carefully considered those cases involving overly broad union-security clauses wherein the Court of Appeals for the Seventh Circuit and the Board have concluded that so-called "deferral" or "savings" clauses, worded similarly to the one involved here, rendered the clauses capable of a lawful construction. See *John L. Lewis, et al.* v. *Quality Coal Corp.*, 270 F.2d 140 (C.A. 7); *Perry Coal Company, et al.* v. *N.L.R.B.*, 284 F.2d 910 (C.A. 7); *Quality Coal Corporation*, 139 NLRB 492, 495. These cases, for the reasons set forth in *Essex County District Council of Carpenters*, [75] are distinguishable in significant respects from the instant situation.[76] Accordingly, I find that the deferral clause attached to the disputed "leasing-licensing out clause," as well as the similar deferral clauses attached to other disputed clauses, discussed *infra*, do not render these clauses ambiguous or otherwise constitute a valid defense to the allegations of the complaint.

Likewise, I reject Respondents' contention that the requirement that the licensee or leasee "abide by the terms"

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[75] *Essex County District Council of Carpenters, etc. (Associated General Contractors of Essex County)*, 141 NLRB 858, 869–870.

[76] Although not specifically mentioned in *Essex County District Council of Carpenters*, another basis for distinguishing the use of the deferral clauses in situations involving overly broad union-security agreements from those involving clauses proscribed by Section 8(e) is that in the former situation a deferral clause has the effect of modifying and limiting the application of the union-security agreement to conform to existing or future laws, whereas, in the latter situation, it is necessary for the parties to do more than just modify or limit the application of the illegal clause, rather, the clause has to either be deleted in its entirety or replaced by a lawful union standards or work protection clause. Cf. *Amalgamated Lithographers of America, etc. (Miami Post Co.)*, 130 NLRB 968, 977–978, enfd. 301 F.2d 22, 29–30 (C.A. 5).

of the UMWA's collective-bargaining agreement with Amax "is simply a catch all clause that requires the successor employer to adhere to union standards." The UMWA's proposed contract included "terms" not required to protect the interests of the employees in the bargaining unit. The licensee or leasee, pursuant to the terms of the contract, is required to recognize the UMWA as the employees' bargaining representative and to adhere not only to the contractual wage-and-hour terms but also to such contractual working conditions as seniority and grievance procedure and dues checkoff. See *Dimeo Construction Co., supra,* 180 NLRB at 421.

Based upon the foregoing, I find that the second paragraph of Article 2, section (h), of the UMWA's proposed contract—the "leasing-licensing out clause"—violated Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to accept a collective-bargaining agreement which included this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3) [77] of the Act, and by insisting to impasse that Amax sign a collective-bargaining agreement which contained this provision, have further violated Section 8(b)(3) of the Act.

c. *The "coal transportation clause"*

The UMWA's first contract proposal of January 6, 1975, included a provision which dealt with the "contracting and subcontracting" of the "transportation of coal," herein called the "coal transportation clause," which reads as follows:

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[77] "A strike to compel inclusion of illegal provisions in a contract is a violation of Section 8(b)(3)." *Amalgamated Lithographers of America, etc.*, 130 NLRB 985, 991. The complaint alleges only that Respondents violated Section 8(b)(3) by adamantly insisting that Amax agree to the disputed clause. However, the object of the Respondents' strike was fully litigated in connection with this particular issue as well as with other issues raised by the pleading.

Article II

* * * * *

Section (g), Contracting and Subcontracting

(a) Transportation of Coal—the transportation of coal as defined in paragraph (a) [78] may be contracted out only to a contractor employing members of the UMWA under this agreement and only where contracting out such work is consistent with the prior practice and custom of the employer.

The complaint alleges in substance that the "coal transportation clause," as quoted above, violates Section 8(e) of the Act, hence, Respondents violated Section 8(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this provision.

Amax at the first bargaining session of January 6, 1975, and then again at the one held March 4, 1975, objected to the disputed provision, expressing the view that it was illegal. None of Amax's contract proposals included such a provision. The UMWA continued to include the provision in its contract proposal of January 27, 1975, and February 26, 1975, and on April 10, 1975, notified Amax that its last contract proposal, which included the "coal transportation clause," remained unchanged. During the period in which the disputed clause remained a part of the UMWA's contract proposal the UMWA was engaged in a strike against Amax at the Belle Ayr Mine in support of its proposed contract. Based on the foregoing, I find Respondents in-

[78] Article II, section (a), entitled "work jurisdiction," of the UMWA's January 6 proposal provides in pertinent part: "The . . . transportation of coal (except by waterway or rail not owned by Employer) . . . shall be performed by classified employees of the employer . . . ." This provision was changed in the UMWA's next proposal of January 27 to read: "The . . . transportation of coal in and around the mine and to a screening, crushing, washing or other preparation facility, or other mine related operations (except by waterway or rail not owned by the Employer) . . . shall be performed by classified employees of the Employer . . . ."

sisted to the point of impasse that Amax accept a contract which included the "coal transportation clause" and that an object of the strike was to require Amax to accept a contract which included this clause.

General Counsel and Charging Party urge that the "coal transportation clause" is an illegal "union signatory" agreement designed to benefit UMWA members generally rather than the Belle Ayr miners. Respondents contend that it is a lawful work preservation clause designed to maintain the jobs and work standards of the Belle Ayr miners. I am of the view that the evidence is insufficient to prove that the limitation of subcontracting to "prior practice and custom" violates Section 8(e) of the Act, but, in agreement with the General Counsel and Charging Party, find that the clause violates Section 8(e) insofar as it limits the subcontracting of the transportation of coal "only to a contractor employing members of the UMWA under this agreement."

A union has a legitimate interest in preventing the undermining of the work opportunities and standards of employees in the contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract. See *Truck Drivers Union Local 413* v. *N.L.R.B. (Brown Transportation Corp.; Patton Warehouse)*, 334 F.2d 539, 548 (C.A.D.C.). Its contract with an employer may include a so-called union standards clause which does not violate Section 8(e) because it has a primary object to aid the employees in the work unit. Where, however, the object is not to protect or preserve the standards of employees in the unit, but to control the employment practices of firms which seek to do business with the employer and to aid and assist union members generally, such object is secondary and unlawful. *Meat and Highway Drivers, etc., Local 710* v. *N.L.R.B. (Wilson & Co.)*, 335 F.2d 709, 716 (C.A.D.C.). A collective-bargaining agreement violates Section 8(e) if it is "tactically calculated to satisfy union objectives elsewhere," rather than to advance the interests of em-

ployees within the unit. *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 644–645.

Here, the "coal transportation clause" provides that Amax may subcontract the transportation of its coal "only to a contractor employing members of the UMWA under this agreement."[79] The disputed clause expressly requires that not only shall the subcontractor agree that its employees will receive the economic benefits of the contract, which would serve the purpose of protecting the interests of the employees in the contract unit, but it also requires him to adhere to the noneconomic terms of the contract, such as, recognition, dues checkoff, seniority and grievance-arbitration clauses, which would be unrelated to this lawful purpose. E.g., *Dimeo Construction, supra*, 180 NLRB 420. Moreover, the clause also unambiguously provides that Amax may contract out only to contractors who employ UMWA members. Thus, the beneficiaries of this provision are not those members employed at the Belle Ayr Mine but the UMWA as a whole. *Meat and Highway Drivers, etc., Local No. 710* v. *N.L.R.B.*, 335 F.2d 709, 717 (C.A.D.C.); see, also, *National Maritime Union (Vantage Steamship)*, 196 NLRB 1100, 1101 ("where an object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful"). In sum, the "coal transportation clause" does not require a signatory to terminate or otherwise curtail contracting out absolutely but only as to those contractors who do not employ UMWA members and who do not recognize the UMWA as their employees' collective-bargaining representative. The effect of this is to make the continuance of the relationship between the signatory employer and any contractor depend upon the latter's decision to employ members of the UMWA and to recognize

[79] I reject Respondents' contention that this portion of the clause is ambiguous and may be reasonably construed as providing "that if transportation of coal is subcontracted out it must be subcontracted out . . . to employers who maintain the standards of the UMWA agreement." I have considered Respondents' ingenious exercise in logic upon which this contention is based but am of the opinion it is a far-fetched interpretation.

the UMWA as his employees' bargaining representative. Thus, a significant factor in determining whether or not the signatory employer does business with a contractor depends upon the contractor's internal labor relations policy and not the contractor's maintenance of union wage scales or similar conditions which might otherwise adversely affect the bargaining unit members. In these circumstances, I cannot find that the "coal transportation clause" is aaddressed to the labor relations of the contracting employer vis-a-vis its own employees, but rather I find it was tactically calculated to achieve union objectives elsewhere. Accordingly, I find that the clause is an unlawful "union signatory" provision and therefore violates Section 8(e) of the Act.

Based on the foregoing, I find that the "coal transportation clause," Article II, section (g)(1), of Respondent's proposed contract violates Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3),[80] and, by insisting to impasse that Amax accept a collective-bargaining agreement which contained this provision, Respondents have further violated Section 8(b)(3) of the Act.

d. *The "repair and maintenance work clause"*

The UMWA's first contract proposal of January 6, 1975, included a provision which dealt with the contracting and subcontracting of repair and maintenance work, herein called the "repair-maintenance work clause," which read as follows:

> Article II
>
> Section (g) Contracting and Subcontracting
>
> (2) Repair and Maintenance Work-Repair and maintenance work customarily performed by classified employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under war-

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[80] See footnote 77, *supra*.

> ranty or (b) where the Employer does not have available equipment or regular employees with necessary skills available to perform the work at the mine or central shop, provided, however that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

The complaint alleges, in substance, that this provision, as quoted above,[81] violates Section 8(e) of the Act, thus, the complaint further alleges, Respondent violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which includes this provision.

On January 6, 1975, at the first bargaining session, and then again at the one held March 4, 1975, Amax objected to the "repair-maintenance work clause," expressing the view that it was illegal. During the relevant time period herein, Amax's first contract proposal submitted on January 6, 1975, gave itself complete freedom to contract out repair and maintenance work. This freedom was curtailed in Amax's February 18, 1975 proposal which provided that "no existing employee will be laid off" as the result of the subcontracting of maintenance or repair work. The UMWA included the disputed clause in its contract proposals of January 6, 1975, January 27, 1975, and February 26, 1975, and on April 10, 1975, notified Amax that its last contract proposal, which included the disputed clause, remained unchanged. During the period when the "repair-maintenance work clause" remained a part of the UMWA's contract proposal, the UMWA was engaged in a strike at the Belle Ayr Mine, accompanied by picketing, in

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[81] The UMWA contract proposal of July 1, 1975, changed the clause's final proviso to read: "provided, however, that the work shall be performed under union standards applicable in the area." The next UMWA contract proposal of November 14, 1975, further modified this proviso to read: "under UMWA standards" instead of "Union standards." The complaint does not question the legality of these subsequent proposals. Accordingly, I have not considered the Charging Party's contention that, as worded on July 1, 1975 and November 14, 1975, the "repair-maintenance work clause" violated Section 8(e).

support of its proposed contract. Considering all of the foregoing circumstances, and the entire record, I find Respondents insisted to the point of impasse that Amax agree to the "repair-maintenance work clasue" and that an objective of the strike against Amax was to require Amax to sign a contract which included this clause.

The "repair-maintenance work clause" permits the signatory employer to subcontract out repair and maintenance work customarily done by the employer's employees in situations involving warranty work or where equipment is not available or where there are no regular employees available to perform the work, "provided, however, that the work, shall be performed by UMWA members to the extent and in the manner permitted by law." The UMWA takes the position that the restriction of subcontracting to persons who employ UMWA members is nothing but a permissible union standards restriction. The Charging Party and General Counsel urge that this restriction is based on illegal secondary objectives. In the alternative, the Charging Party contends that even if the restriction of subcontracting to persons who employ UMWA members is not an illegal limitation, the disputed clause is still outlawed by Section 8(e) because it does not encompass fairly claimable unit work. I am of the opinion that the "repair-maintenance work clause" violates Section 8(e).

The short answer to Respondents' contention, that restricting subcontracting to persons who employ UMWA members, is a permissible union standards provision is that such a restriction, on its face, indicates that the subcontracting agreement is not addressed to the labor relations of the contracting employer vis-a-vis his own employees.[82] See *A. Duie Pyle Inc.* v. *N.L.R.B.*, 383 F.2d 772, 777-778 (C.A. 3); *Meat and Highway Drivers, etc.*,

[82] In urging that the clause in question does not have an illegal secondary objective, Respondents point to a February 18, 1975 negotiating meeting discussion between the parties' principal negotiators. However, this discussion occurred in connection with the disputed "construction clause," discussed *infra*, not the instant one; thus, it sheds no light at all upon Respondents' objective in proposing the instant clause.

Local Union No. 710 v. *N.L.R.B.*, 335 F.2d 709, 717 (C.A.D.C.); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 (Carnation Co.)*, 181 NLRB 882, 886; also see the discussion, *supra*, in connection with the "leasing-licensing out clause." Likewise, for the reasons set forth *supra*, in connection with the "leasing-licensing out clause," I am of the opinion that the deferral clause does not render ambiguous the requirement that subcontracting be restricted to persons who employ UMWA members, nor does it otherwise constitute a valid defense to the allegations of the complaint.

Based on the foregoing, I find that the "repair-maintenance work clause," Article II, section (g)(2) of the UMWA's contract proposal, violates Section 8(e) of the Act, and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to enter into an agreement containing this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3)[83] of the Act, and, by insisting to impasse that Amax accept a collective-bargaining agreement which contained this provision, Respondents have further violated Section 8(b)(3) of the Act.

I reject the Charging Party's alternative theory advanced to support the finding of a violation. This theory rests upon the proposition that the restricting, included in the disputed provision, upon the subcontracting of maintenance and repair work "where the employer does not have available equipment or regular employees with necessary skills available to perform the work" is not work performed by the unit employees and, as such, is not subject to restriction by an otherwise valid union standards clause, citing *Teamsters Local 216 (Bigge Drayage Co.)*, 198 NLRB 1046, 1047, enfd., 520 F.2d 172 (C.A.D.C.). *Bigge Drayage*, however, involved work acquisition. There the bargaining unit employees had never done the claimed work and their employer was not equipped to perform the work. See, generally, *Teamsters Local Union No. 94, et al. (California Dump Truck Owners Association)*, 227 NLRB No. 27, slip opinion at pages 9–10. I cannot say

[83] See footnote 77, *supra*.

that the above-quoted portion of the disputed clause is an impermissible work acquisition clause rather than a lawful unit protection or union standards clause designed to preserve unit work for unit employees and to insure that negotiated standards will not be undermined. The clause, as worded, deals with "work customarily performed" by the bargaining unit's employees, and, in pertinent part, may be construed as an "overflow clause" which may come into operation due to the employer's failure to buy or lease new equipment to replace old obsolete equipment or to replace employees who have been terminated or have voluntarily terminated their employment. In other words, the clause may be construed to have as its objective the prevention of the bargaining unit from being eroded by subcontracting. See *Meat and Highway Drivers, etc., Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 715–716 (C.A.D.C.), and *Teamsters Local 386 (R.P.B. Trucking)*, 172 NLRB 1037. In any event, assuming the clause in question is susceptible to the interpretation proposed by the Charging Party, it is equally, or more susceptible, to the interpretation that it covers bargaining unit work. No extrinsic evidence was adduced to indicate that the clause was intended to cover work which the unit employees do not perform.[84] In these circumstances, "where the clause is not clearly unlawful on its face, the Board will not interpret it to require no more than what is allowed by law" *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517. It is for these reasons that I reject the Charging Party's alternative argument that, even if the limitation of subcontracting to persons who employ UMWA members is not an illegal restriction, the disputed clause is still outlawed by Section 8(e) because it does not encompass fairly claimable unit work.

Likewise, I reject the Charging Party's contention that since the UMWA's contract proposal covered all of Amax's

[84] The fact that there is no central shop at the Belle Ayr Mine does not lend support to the contention that the disputed clause covers work that the unit employees do not perform. All it indicates is that the clause insofar as it refers to a central shop would not apply to the Belle Ayre Mine.

western facilities, not just the Belle Ayr Mine, that it establishes an illegal secondary object for each one of the clauses involved in this case which are alleged to violate Section 8(e) of the Act. Although the UMWA's contract proposals involving the "coal lands clause" and "enabling clause," if accepted, would have required Amax to negotiate on an employer-wide basis in the west, which, under the circumstances of the case, as found *supra*, constitute a nonmandatory subject of bargaining, it is not relevant to the resolution of the question of whether certain contract proposals violate Section 8(e), a section of the statute which deals with the cessation of business between *different employers*.

e. *The construction clause*

Article II, section (i) of the UMWA contract proposal entitled "Construction Clause," in pertinent part, restricts Amax's subcontracting of "all construction mine or mine related facilities" to contractors "under the jurisdiction of the UMWA in the manner and to the extent permitted by law." The UMWA modified this proposal during the negotiations but, as described *infra*, the limitation placed upon the contracting out of construction work, which is an issue in this proceeding, remained essentially the same throughout the negotiations. The complaint alleges in substance that the contractual provision limiting subcontracting of construction work to persons under the jurisdiction of the UMWA violates Section 8(e) of the Act, thus, Respondents violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this provision.

On January 6, 1975, at the first bargaining session, Amax objected to the "construction clause," as proposed by the UMWA, challenging its legality. Amax's January 6, 1975 contract proposal granted it absolute freedom to subcontract out mine or mine-related construction work. On January 11, 1975, however, Amax submitted a new con-

tract proposal which included a "construction clause" identical to the UMWA's proposal:

> All construction of mine or mine related facilities including the erection of mine tipples and sinking of mine shafts or slopes which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the UMWA in the manner and to the extent permitted by law.

The parties' contract proposals on this subject remained virtually identical until February 17, 1975, when the UMWA modified its proposal as follows:

> All construction of mine or mine related facilities including, the erection of mine tipples which is not performed by the Employer may be performed by such outside contractors as are designated by the Employer. *Except where UMWA contractors qualified to do the work are not available,* such work will be under the jurisdiction of the UMWA in the manner and to the extent permitted by the law. *In any proceeding commenced under this section, the burden of proof shall be on the Employer to prove that the UMWA contractors qualified to do the work are not available.* [Emphasis added to indicate modifications.]

On February 18, 1975, Amax's proposal was modified as follows:

> All construction of mine or mine related facilities including the erection of mine tipples, at the mine covered by this agreement, which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the UMWA *in as far as is economically reasonable* in a manner and to the extent permitted by law. [Emphasis added to indicate modifications.]

During the February 18, 1975 negotiating meeting, Cairns, for Amax, indicated there was confusion in Amax's mind about the intent of the UMWA's proposal. Cairns explained to the UMWA's negotiators that the requirement that Amax use only contractors who employed

UMWA members or contractors who belonged to the Association of Bituminous Contractors, herein called the ABC,[85] was impractical because there were no UMWA-represented construction companies located in the western part of the United States, which meant that Amax would have to use eastern contractors which was too expensive. Cairns also stated that Amax felt it should not be placed in a position where a contractor might bring a lawsuit against Amax for refusing to do business because the contractor was not an ABC contractor, a contractor under contract with the UMWA. Edelman, for the UMWA, told Cairns, "I agree with your intent, and that is the intent that the Mine Workers have." Cairns asked Edelman to reduce "this intent" into writing immediately. Edelman refused, stating he would be willing to tender a memorandum of understanding on the subject at a later date.[86]

The UMWA's February 17, 1975 proposal stayed essentially the same until November 14, 1975, when it was withdrawn and the Union agreed to accept Amax's construction clause proposal. In the interim, before the UMWA's acceptance of Amax's proposal, Amax's negotiators during March 1975, July 1975, and August 1975, at negotiation meetings, objected to the UMWA's proposed construction clause, taking the position that it was illegal. Then, on December 7, 1975, Amax modified its construction clause proposal as follows:

> All construction of mine or mine related facilities . . . may be performed by such outside contractors as are designated by the Employer, and such work will

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[85] The ABC is an employer association which represents construction industry contractors and, on their behalf, negotiates and is a party to a collective-bargaining agreement with the UMWA, the National Coal Mine Construction Agreement, which covers employees of subscontractors who perform construction work at coal mines or related facilities. Amax is not signatory to this agreement.

[86] The description of what took place on February 18, 1975, is, for the most part, based on a composite of the testimony of Edelman and Cairns, but, where their testimony conflicts, I have credited Edelman, who, as indicated *supra*, impressed me as the more trustworthy witness.

> be under the jurisdiction of the UMWA as far as is economically reasonable (*giving due consideration to cost, quality of work, availability, time of completion, and other appropriate business judgments*) in a manner and to the extent permitted by law. [Emphasis added to indicate the modifications made on December 7, 1975.]

On that date, at a bargaining session, Amax took the position that the construction clause, as well as several other clauses proposed by the UMWA, was illegal even though Amax itself was offering similar clauses which contained the alleged illegal language. Bank, for UMWA, stated he could not understand why Amax was claiming that certain proposals were illegal yet was proposing similar clauses. Sulley, for Amax, explained that the Company was not waiving any light to object to these clauses, but in the interest of reaching an agreement was willing to compromise on these clauses and would be willing to sign an agreement, under protest, that included the clauses. This is where the parties stood on the question of the construction clause when the negotiations broke off in February 1976.

The Charging Party and General Counsel argue that the construction clause violates Section 8(e) of the Act because it is an illegal "union signatory" agreement, that is, an agreement requiring subcontractors to have collective-bargaining agreements with the UMWA. Respondents deny this and contend that "the intent of the clause is to allow the employer to contract out the construction work at the mine to employees who meet UMWA standards." I am of the opinion that the clause is a "union signatory" agreement which violates Section 8(e) of the Act.[87]

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[87] I reject the Charging Party's alternative contention that, even if the restriction is not an impermissible "union signatory" agreement, the disputed clause still violates Section 8(e) because the unit employees do not perform the construction work covered by the clause. The record does not establish this. The Board's certification which covers production and maintenance employees does not on its face support such a conclusion, nor does the fact that the mine's facilities were originally built by outside contractors. Likewise, the Employer's prac-

The restriction of the subcontracting of all construction of mine or mine-related facilities to persons "under the jurisdiction of the UMWA" is an explicit "union signatory" agreement. Even if the phrase, "under the jurisdiction of the UMWA," is considered ambiguous, the ambiguity was removed, and the Union's intent revealed, on February 17, 1975, when the UMWA modified the clause so as to provide that construction work must be contracted out to persons under the jurisdiction of the UMWA, "except where UMWA contractors qualified to do the work are not available."[88] Under the circumstances and for the reasons given in connection with the earlier conclusion that the "coal transportation clause" and "leasing-licensing out clause" violate Section 8(e) of the Act, I find that the disputed construction clause is a "union signatory" agreement which violates Section 8(e). See *Truck Drivers Local 413* v. *N.L.R.B.*, 334 F.2d 539, 548 (C.A.D.C.); *Meat Highway Drivers Local 710* v. *N.L.R.B.*, 335 F.2d 709, 713, note 11 (C.A.D.C.); *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (C.A. 9). Also, for the reasons given in connection with the earlier conclusion that the "leasing-licensing out clause" violates Section 8(e), I find the deferral proviso attached to the construction clause does not make ambiguous the requirement that the subcontracting be limited to persons "under the juris-

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tice, as Payne testified, of subcontracting work—which work Payne did not describe—for which it has neither the equipment nor employees is not sufficient to support a finding that unit employees do not perform the type of construction work covered by the disputed clause.

[88] I reject Respondents' contention that on February 18, 1975, UMWA negotiator Edelman in effect told Amax's negotiator Cairns it was not the intent of the construction clause to require Amax to subcontract to UMWA employers. As described above, Edelman's statement to Cairns is ambiguous. Moreover, Edelman's unconvincing reason—"I never got together with them for that purpose"—for not submitting memorandum of understanding to Amax on this matter, as he had promised, when coupled with the unambiguous language of the clause itself which expressly restricts the subcontracting to "UMWA contractors" establishes that even if Respondents' interpretation of Edelman's comment is correct, it was not a sincere statement about the meaning of the clause.

diction of the UMWA," nor does it otherwise constitute a valid defense to the allegations of the complaint.

The complaint alleges in substance that Respondents violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike against Amax where an object thereof was to require Amax to agree to a contract which included the construction clause and violated Section 8(b)(3) by adamantly insisting that Amax agree to a contract which included this illegal clause. Respondents take the position that, assuming the construction clause violates Section 8(e), the record nevertheless fails to establish that Section 8(b)(4)(A) and Section 8(b)(3) of the Act have been violated. Respondents argue that, since Amax included the disputed provision in its own contract proposal, bargaining never reached an impasse and logically Respondents could not have been striking to require Amax to accept a "union signatory" agreement already agreed to by Amax. The issue is a bothersome one, but on balance I find Respondents' strike against Amax, at least by the conclusion of the December 7, 1975 meeting, had as an object the requirement that Amax accept a contract which included the construction clause and likewise, by at least the conclusion of the February 17-18, 1976 meetings, the parties had reached a bargaining impasse over this matter. I recognize that at the inception of the negotiations, Amax incorporated the illegal portion of the construction clause into its own contract proposal and continued to offer it throughout the negotiations and, on November 14, 1975, the UMWA accepted Amax's version of the clause. On the other hand, the record shows that Amax originally objected to the construction clause, challenging its legality, and it was only in an effort to avoid the UMWA's threatened strike that on January 11, 1975, Amax included the clause in its contract proposal. Thereafter, throughout the negotiations, Amax objected to the clause—challenging its legality—and finally on December 7, 1975, in addition to challenging the clause's legality, in effect told the UMWA that the sole reason it was including this clause in its contract proposal was that the UMWA was demanding such a clause and that in the interest of reaching agreement on a contract,

Amax would go along with UMWA on this matter but would incorporate the clause in any final agreement reached by the parties only under protest. Nonetheless, in the face of Amax's opposition, the UMWA did not indicate it was amenable to dropping this provision from its proposed contract, rather it continued to strike to require Amax to accept a contract which included the construction clause. Under these circumstances, I am convinced that if there was any doubt in Respondents' mind that Amax was unequivocally opposed to the construction clause because it was illegal, this doubt was removed by at least December 7, 1975. By continuing after that date to offer a contract which included this provision, over Amax's objections, the Respondents bargained to an impasse over this matter,[89] thus violating Section 8(b)(3) of the Act. Also, I find that, by continuing after December 7, 1975, to engage in a strike against Amax for a contract which included the construction clause, Respondents violated Section 8(b)(4)(i) and (ii)(A), as alleged in the complaint, as well as Section 8(b)(3) of the Act.[90]

f. Work jurisdiction clause

Article II, section (a) of the UMWA contract proposal entitled "Work Jurisdiction," sets forth the work covered by the UMWA contract proposal. The clause as proposed by the UMWA throughout the negotiations, in pertinent part, reads:

> Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this article [referring to Article II, sections (g), (h) and (i)].

Sections (g), (h) and (i) of Article II referred to in the work jurisdiction clause, as found *supra*, violate Section

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[89] The record reveals that the parties reached a bargaining impasse by the end of the negotiating meetings of February 17-18, 1976, at which time negotiations broke off. Since then until the date of the hearing in this case, July-August 1976, the parties did not meet and their bargaining positions remained unchanged.

[90] See footnote 77, *supra*.

8(e) of the Act. Accordingly, insofar as the work jurisdiction clause incorporates these illegal provisions, it likewise violates Section 8(e) of the Act.[91] Also, the record establishes that the UMWA proposed the work jurisdiction clause in the face of Amax's January 6, 1975 and March 4, 1975 objections to its legality and, on April 10, 1975, the UMWA notified Amax that the UMWA's last contract proposal, which included the work jurisdiction clause, remained unchanged. Thus, I find that by at least April 10, 1975, the UMWA and Amax had bargained to an impasse over the work jurisdiction clause. I also find that an object of the UMWA's strike was to require Amax to accept a contract which included the work jurisdiction clause.

Based on the foregoing, I find that the work jurisdiction clause, Article II, section (a) of the UMWA's contract proposal violates Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to enter into an agreement containing the work jurisdiction clause, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3) of the Act, and further violated Section 8(b)(3) by insisting to impasse that Amax accept an agreement which included the work jurisdiction clause.

6. The alleged refusal to meet and bargain

The complaint alleges that Respondents refused to meet and bargain with Amax from approximately January 6, 1975 until February 3, 1975, thus violating Section 8(b)(3) of the Act. The perinent facts are briefly summarized.

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[91] The complaint challenges only the legality of the work jurisdiction clause insofar as it is read in conjunction with Article II(g)(1) and (2) which deal with the contracting out of the transportation of coal and the repair and maintenance work. However, the question of whether the other portions of Article II which are incorporated into the work jurisdiction clause violate Section 8(e) was alleged in the complaint. In other words, the question of whether the work jurisdiction clause is proscribed by Section 8(e) by its incorporation of the "leasing-licensing out clause" and the construction clause is inextricably related to the other allegations of the complaint, and the matter was fully litigated.

The collective-bargaining agreement covering the Belle Ayr Mine, as extended by the UMWA, was scheduled to terminate January 12, 1975, and, absent a new agreement, the employees were scheduled to strike. The negotiations for a successor agreement were delayed, as described *supra*, by the pendency of an unresolved question concerning representation and by the discussions between the parties about the UMWA's request that Amax designate the Peabody Group as its bargaining representative. I have found, *supra*, that Amax did not designate the Peabody Group as its representative for the purposes of collective bargaining. Rather, on December 17, 1974, as found *supra*, Amax told the UMWA it intended to bargain separately, not through the Peabody Group, for a contract covering the Belle Ayr Mine. The next day, by letter described *supra*, Amax in effect requested the UMWA to commence negotiations with Amax for such a contract. The UMWA refused to meet with Amax for this purpose, taking the position that Amax had designated the Peabody Group as its collective-bargaining representative and was bound by the terms of any collective-bargaining agreement negotiated between the UMWA and the Peabody Group.[92] Not until February 3, 1975, did the UMWA accede to Amax's requests for negotiations and meet with its negotiators to commence bargaining for an agreement to cover the Belle Ayr Mine. In the meantime, the parties' collective-bargaining agreement terminated and the scheduled strike commenced.

The UMWA refused to meet with Amax to negotiate a contract covering the Belle Ayr Mine from about December 18, 1974 until February 3, 1975, a period of about 6 weeks. The UMWA's justification for refusing to negotiate with Amax was not based on a good-faith believe that Amax had designated the Peabody Group as its bargaining representative. If the UMWA ever held such a belief, it was dispelled by Amax's unambiguous assertion made on

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[92] The January 6–7, 1975 meetings between the parties' representatives were regarded by the UMWA as merely informational meetings, not negotiation meetings.

December 17, 1974, that it intended to bargain separately, not through the Peabody Group, for a contract covering the Belle Ayr Mine. In addition, the next day, Amax by letter in effect asked that negotiations for such a contract commence between the parties. Nonetheless, the UMWA refused to negotiate with Amax, thus displaying a singular disregard for its legal duty to meet with Amax for the purpose of negotiating the terms of a contract for the Belle Ayr Mine. The fact that the UMWA eventually commenced these negotiations on February 3, 1975, under pressure from the Board, does not minimize the seriousness of the misconduct or otherwise remove the stigma of illegality. The refusal to negotiate took place at perhaps the most critical period during contract negotiations—just prior to the scheduled termination of the current contract which the parties knew would result in a strike absent a new agreement—when the parties normally are expected to make substantial progress in reaching agreement. Under the circumstances, it is extremely doubtful that the UMWA can ever undo the damage to the state of negotiations that its refusal to meet, by its nature, was calculated to create.

Based on the foregoing, I find that Respondents from on or about December 18, 1974, until February 3, 1975, refused to meet for the purpose of negotiating a collective-bargaining agreement covering the Belle Ayr Mine with representatives of Amax, thereby violating Section 8(b)(3) of the Act.

7. The alleged overall failure to bargain in good faith

The amended complaint charges the UMWA with an overall failure to bargain in good faith. The UMWA, as an affirmative defense to this allegation and to the allegation that it impermissibly bargained to an impasse over nonmandatory and illegal bargaining subjects, contends that Amax engaged in a course of overall bad-faith bargaining.[93] Guided by the applicable principles of law, set forth

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[93]The law is settled that where one of the parties to collective-bargaining negotiations bargains in bad faith, it is impossible to test

below, I am of the opinion that neither party engaged in a course of overall bad-faith bargaining.

a. *The applicable principles of law*

The duty to bargain collectively, which an employer and the duly-designated representative of his employees owe to one another under Section 8(b)(3) and 8(a)(5) of the Act, is defined in Section 8(d) of the Act as "the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." This statutory requirement of good faith "can have meaning only in its application to the particular facts of a particular case." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 410. Ultimately, the question of whether a party has conducted his negotiations in good faith involves a finding of motive or state of mind which must be inferred from the evidence viewed as an integrated whole, or as one Court has stated: "based on the overall conduct of the party charged." *N.L.R.B.* v. *General Electric Co.*, 418 F.2d 736, 756 (C.A. 2). No party is required to make concessions, no one need yield any position fairly maintained and "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, *supra*, 343 U.S. at 404. On the other hand, "[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract"; though "the parties need not contract on any specific terms . . . they are bound to deal with each other in a serious attempt to resolve differences and

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the good faith of the other party and, likewise, it is impossible to conclude the parties bargained to an impasse. *Times Publishing Company* 72 NLRB 676, 682; *N.L.R.B.* v. *Big Three Industries, Inc.*, 497 F.2d 43 (C.A. 5).

reach a common ground." *N.L.R.B.* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485–486. Similarly, in *N.L.R.B.* v. *Katz*, 369 U.S. 736, 747, the Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but also from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion." In other words, "good faith bargaining must be evinced by more than superficial efforts to negotiate a wage agreement. Good faith means sincerity, candor, and a willingness to negotiate toward the possibility of effecting compromises." *N.L.R.B.* v. *Generac Corporation*, 354 F.2d 625, 628 (C.A. 7).

b. *The UMWA's alleged failure to bargain in good faith*

The UMWA, for the sake of bargaining convenience, wanted all western sub-bituminous and lignite coal operators, whose employees it represented, to bargain through one employer group. In order to further this objective, the UMWA, as found supra, used a tactic proscribed by Section 8(b)(1)(B) of the Act and, when Amax failed to succumb, the UMWA then, in violation of Section 8(b)(3) of the Act, as found *supra*, refused to meet and negotiate. The UMWA commenced to bargain only when threatened by the Board's General Counsel with a court injunction. But it does not automatically follow that the UMWA sat down at the bargaining table and bargained in bad faith. The illegal conduct which was a prelude to the negotiations, however, has made me especially critical in evaluating the UMWA's bargaining conduct.

The Charging Party contends that from the start of the negotiations on February 3, 1975 through February 26, 1975, the date the UMWA offered the Western Agreement as its contract proposal, the UMWA was not bargaining in good faith but was merely going through the motions until it reached a Western Agreement with the Peabody Group. I am not convinced this was the case. There is no evidence that during this period or thereafter, the UMWA's repre-

sentatives either at or away from the bargaining table voiced statements or engaged in other conduct which shows the UMWA was stalling Amax until the negotiations with the Peabody Group concluded. To the contrary, the UMWA's negotiatons informed Amax that the UMWA intended to negotiate and reach agreement with either Amax or the Peabody Group or P & M, depending upon which one offered the better agreement and this agreement would serve as a pattern agreement for the western coal operators whose employees were represented by the UMWA. The fact that the UMWA during this stage of the negotiations drove a hard bargain and sought contractual uniformity does not make out a case of bad-faith bargaining. There is not statutory requirement that a union or employer make concessions to demonstrate its good faith. *N.L.R.B.* v. *American National Insurance, Co., supra,* 343 U.S. at 404. See, also, *N.L.R.B.* v. *General Electric Company,* 418 F.2d 736, 758 (C.A. 2) ("[T]he absence of concessions would not prove bad faith, their presence would . . . raise a strong inference of good faith"). Moreover, the UMWA's negotiators, as fully described *supra,* during the meetings held in February 1975 indicated a willingness to compromise in several areas. And, regarding the UMWA's demand for contract uniformity, the Supreme Court has recognized "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards . . ." and "a union may adopt a uniform wage policy and seek vigorously to implement it . . . ." *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666, footnote 2.

Likewise, I am not persuaded that following the culmination of negotiations between the UMWA and the Peabody Group which resulted in the so-called Western Agreement, the UMWA bargained in bad faith in that, as alleged in the complaint, it "exhibited a predetermined resolve not to agree to any proposal but [its] own." Here, the Charging Party and the General Counsel challenge the legality of the UMWA's historical practice of demanding contract uniformity, as it was applied in this particular case. The Supreme Court in *Pennington, supra,* has rec-

ognized the UMWA has a legitimate aim to obtain "uniformity of labor standards." But neither *Pennington* nor any other court or Board decision stands for the proposition that a labor organization in pursuit of its legitimate aim of maintaining uniform labor standards may violate important public policies reflected in the National Labor Relations Act. Obviously, all union or employer policies, regardless of their legitimacy, are circumscribed by the statutory duty to bargain in good faith. In the instant case, while the UMWA has the right to consider and weigh the impact of any settlement in the appropriate unit on the employees outside the unit, it could not in this respect bargain from "a fixed inflexible position . . . rigidly unwilling to consider seriously any possible alternatives to its proposal." *Local Union No. 103 Ornamental Iron Workers*, 190 NLRB 741, 742, enfd. on this point, 465 F.2d 327, 334–335 (C.A. 7). In other words, the efforts of the UMWA to obtain uniform working conditions among the western coal producers, whose employees it represents, is limited by its statutory duty to bargain in good faith.

The record does not establish that the UMWA, in demanding that Amax sign the Western Agreement, pursued its policy of contract uniformity with a closed mind or from a fixed inflexible position or was rigidly unwilling to consider seriously any possible alternatives to the Western Agreement. Quite the contrary, on March 4 and March 7, 1975, the UMWA's negotiators indicated to Amax the UMWA was willing to deviate from the terms of the Western Agreement to take into account any special circumstances that existed at the Belle Ayr Mine. On June 16, 1975, the UMWA's spokesperson, Yablonski, informed Amax's representative, Sonnemann, that the UMWA in effect was willing to deviate from the terms of the Western Agreement and make concessions in order to break the bargaining deadlock. Thereafter, on July 1, 1975, and again on November 14, 1975, the UMWA transmitted comprehensive contract proposals to Amax which deviated substantially from the Western Agreement and which offered numerous and substantial concessions. Further evidence that the UMWA did not negotiate with a mind

closed to accepting nothing but the Western Agreement is shown by the collective-bargaining agreements, which deviated significantly from the Western Agreement, which the UMWA reached with western coal operators P & M on or about April 28, 1975, and North American Coal Company on or about June 6, 1975. Under all of these circumstances, I find the UMWA's demand that Amax accept the terms of the Western Agreement, a demand made pursuant to the UMWA's legitimate historical efforts to maintain uniform working conditions in the coal industry, did not constitute bad-faith bargaining in violation of Section 8(b)(3) of the Act.

Likewise, the Charging Party's contention that the UMWA's conduct of breaking off negotiations in August 1975, for approximately 2 months, supports an inference of bad-faith bargaining is without merit where, as here, the record establishes the parties had bargained to an impasse. The UMWA's July 1, 1975 contract proposal made a number of concessions and, as such, broke the prior bargaining impasse. Thereafter, negotiating meetings were held on July 21–22, 1975, and August 7–8, 1975, with, as fully described *supra*, virtually no movement on the part of Amax. It was at this point the UMWA notified Amax that, due to the lack of substantial bargaining movement by Amax in response to the Union's July 1 contract proposal, the UMWA viewed further negotiations as a waste of time. In reply, Amax stated it was prepared to continue to bargain but offered no concessions and took the position that the UMWA's July 1 contract proposal contained nothing of substance which warranted concessions. Under these circumstances, I am of the view that the assessment of the UMWA that further bargaining, at that time, would have been futile was correct. In short, the negotiations once again had reached a point of impasse.

I also reject the General Counsel's contention the record establishes that the UMWA bypassed the negotiators Amax selected and instead bargained with other company officials. This contention, which borders on the frivolous, rests upon the following evidence: (1) Hollie Hopper,

Amax's president who was not a member of the Company's negotiating team, was present at the March 4, 1975 negotiation meeting. His presence was arranged by the FMCS after Yablonski suggested it might be helpful to have a senior corporate official present at the negotiations. (2) On May 30, 1975, UMWA President Miller wrote the president of Amax, Inc., Amax's parent, and forwarded a courtesy copy of the letter to Amax's board of directors. Miller presented the UMWA's version of the labor dispute and set forth the UMWA's position about the issues which divided the parties. The letter ended, "I thank you for your willingness to hear our views, and I hope to hear yours." (3) On June 16, 1975, Yablonski met with Sonnemann, an upper echelon Amax, Inc. official who normally was not a member of the Company's negotiating team. This meeting was arranged by the FMCS after Yablonski mentioned that Sonnemann's presence at the negotiation meeting held on May 28, 1975, was very helpful and his presence at future meetings might help the parties reach agreement. There is no evidence that Yablonski requested the FMCS to arrange for Sonnemann and himself to meet outside the presence of the Company's negotiating team. (4) On July 22, 1975, UMWA's representatives attended a special meeting of Amax's stockholders where the UMWA representatives presented the Union's side of the labor dispute to the corporate officials and shareholders. In sum, there is no evidence that the UMWA by means of coercion or in any othe manner attempted to dictate to Amax which company officials should represent it at the bargaining table or otherwise attempted to bypass the company's chosen negotiators and bargain with other company officials.

The contention of the General Counsel and the Charging Party that the UMWA, to support its position in its labor dispute with Amax, encouraged the miners represented by the UMWA at Amax's midwestern mines in April 1975 to strike, even if true, is insufficient to support an inference that the UMWA was engaged in overall bad-faith bargaining. See *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477. In any event, the

record fails to establish the UMWA's responsibility for the strike. The sole evidence attributing these strikes to the UMWA consists of remarks made by UMWA official Marketti and UMWA District Representatives Henry and Gibson as follows: (1) On January 7, 1975, Marketti warned Amax's negotiators that if no contract was reached by January 12, 1975, the UMWA would strike the Belle Ayr Mine and Amax could expect to have problems everywhere. This remark which on its face is ambiguous cannot be construed as a union threat to strike Amax's midwestern mines, especially in view of the well known proclivity of the members of the UMWA to engage in unauthorized strikes in support of their fellow members at other mines. (2) On April 7–8, 1975, Henry in conversations with Frank Sarno, Amax's manager of labor relations, indicated that UMWA members who had struck Amax had told Henry they were upset over the Company's failure to sign a contract covering the Belle Ayr Mine. Henry told Sarno he could not understand why Amax would not sign a contract similar to the one signed by the Peabody Group and, with respect to the strikers, remarked that even though he was having difficulty speaking to them, he would do what he could to get them back to work. (3) Gibson, at about the same time, told Sarno that he would do all he could to get the UMWA members who were on strike back to work, but would have an easier time convincing them to return if Amax would sign the Western Agreement. Assuming, *arguendo*, Henry and Gibson are agents of the UMWA, their above-described remarks are insufficient to attribute responsibility for the strikes at the Amax's midwestern mines to the UMWA.[94]

I also have rejected as a matter of law the contention that the conduct of the UMWA in encouraging the miners it represents at Amax's midwestern mines to refuse to perform work assignments supports an inference that the

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[94] Only some of Amax's midwestern mines, whose employees are represented by the UMWA, were struck by their employees and the strikes occurred during different days in Arpil 1975 and lasted for only 1 or 2 days, which hardly has the earmarks of a UMWA effort.

UMWA was engaged in overall bad-faith bargaining. See. *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477. In any event, the course of economic conduct which the UMWA urged upon its midwestern members employed by Amax was protected by Section 7 of the Act. In June 1975, the UMWA asked its members employed at Amax's several midwestern mines, represented by the UMWA, to support their "brothers" employed at the Belle Ayr Mine by working "by the letter of the contract and no more." The UMWA specifically asked its members to decline to perform work requests which they had the right to refuse under the terms of the governing collective-bargaining agreement, i.e., working overtime or on holidays. The sole evidence of any such refusal to perform services involves two mines where the employees refused to work Sunday, an assignment they are not required by the contract to accept. In sum, the economic activities which the UMWA urged upon its midwestern members employed by Amax involved concerted activities sanctioned by Section 7 of the Act rather than conduct in derogation of a collective-bargaining agreement or otherwise unprotected or illegal.

The fact that the UMWA violated the Act by insisting to impasse that Amax agree to contract provisions containing nonmandatory and illegal bargaining subjects, and further violated the Act by striking Amax for an object of securing a contract which included illegal provisions, does not support an inference that the UMWA was engaged in overall bad-faith bargaining. In the case of each nonmandatory and illegal contract provision questioned in this proceeding, except for one, the UMWA eventually yielded to the Company's objections and deleted the offending provision from its contract proposal.[95] The one clause which it did

[95] The contract provisions offered by the UMWA which are not in question in this proceeding but which the Charging Party, as fully discussed *supra*, claims are nonmandatory bargaining subjects—the exemptions clause, the 1950 pension trust, and the status of Local 1854 as a signatory to the contract—were also eventually deleted by the UMWA from its contract proposal.

not delete, the construction clause, was previously included in the old contract between Amax and the UMWA covering the Belle Ayr Mine and, as fully described *supra*, although objecting to its inclusion in the new agreement, Amax continued to include the clause, insofar as it violated Section 8(e), in its own contract proposal. There is no evidence that Respondents' position on the construction clause served to frustrate collective bargaining on other issues, nor is there evidence that the UMWA from July 1, 1975, onward indicated that this clause was one of the items it had to have in an agreement. Indeed, there is no evidence the UMWA from July 1, 1975, onward indicated that any of the contract provisions containing nonmandatory or illegal subject matter, which were still on the bargaining table, was a necessity for a collective-bargaining agreement. In these circumstances, I am of the view that, although the UMWA violated Section 8(b)(3) of the Act and Section 8(b)(4)(A) of the Act by insisting and striking over several of the contract clauses in dispute herein, its conduct in this respect is not indicative of an overall bad-faith approach to the contract negotiations.

Last, but very troublesome, is the question of whether the conduct of the UMWA in initiating litigation and investigation of Amax by the Federal Government charging it with violating the Federal antitrust laws is sufficient to support a finding of overall failure of good-faith bargaining. The evidence concerning this contention is briefly summarized. In the 3rd week of July 1975, the UMWA, as fully described *supra*, charged Amax with violating the Federal antitrust laws in several different respects and threatened that if Amax did not enter into a collective-bargaining agreement with the UMWA by noontime of July 22, 1975, the UMWA would file lawsuits and initiate investigations by the responsible Federal agencies, and publicize Amax's alleged misconduct. No agreement was reached by the deadline. The UMWA, as it threatened, filed a complaint with the Federal Trade Commission, challenging the purchase of 20 percent of Amax's outstanding common stock by the Standard Oil Company of

California (SOCC) and filed additional charges with the FTC, alleging that Amax had violated the Federal antitrust laws in several other respects. The same day the UMWA issued a press release announcing to the public that it had filed the above-described complaint with the FTC and that it has also requested the U.S. Senate to investigate the stock transaction involved. In addition, the press release gave the public the UMWA's version of its labor dispute with Amax and further stated: "Cal Standard [SOCC] is bankrolling Amax's attempt to break the UMWA in the West . . . the Cal Standard/Amax trust would rip off the American consumer while denying Wyoming coal miners their union rights." In addition, UMWA representatives picketed the special stockholders' meeting held by Amax during the afternoon of July 22, 1975, and distributed to the public and to Amax's shareholders and officials copies of the aforesaid news release and leaflets which presented the UMWA's version of its labor dispute with Amax.

To recapitulate, the UMWA attempted to force Amax to enter into a collective-bargaining agreement by threatening to initiate legal proceedings against Amax with the FTC and other government agencies charging it with violating the Federal antitrust laws and threatened to publicize Amax's alleged misconduct. When Amax did not succumb, the UMWA went ahead and engaged in the threatened conduct. This conduct, by the UMWA, which was completely unrelated to the labor dispute between Amax and the UMWA, in my opinion, was reprehensible and is the type of behavior which directly obstructs or inhibits the actual process of discussion at the bargaining table. Nevertheless, the fact that the type of harassment involved herein is personally reprehensible to either an Administrative Law Judge, or the members of the Board, or a court, and is calculated to disrupt the bargaining process in the sense that it will poison the bargaining atmosphere, does not mean that such a tactic is inconsistent with the UMWA's bargaining duty under Section 8(b)(3) of the Act.

In the *Insurance Agents'* case,[96] the Supreme Court held that the harassing tactics which accompanied bargaining negotiations did not furnish a proper basis for finding that the union failed in its statutory duty to bargain in good faith.[97] "At the present statutory stage of our national labor policy," the Court pointed out, "two factors—necessity for good faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." *Id.* at 489. According to the Court, the scope of Section 8(b)(3), and the limiting definition of the statutory duty in Section 8(d) of the Act, precludes the Board from "inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of good faith negotiations." *Id.* at 490. If the Board could regulate what economic weapons may be used as part of collective bargaining, the Court stated, it would be in a position to exercise considerable influence upon the substantive terms under negotiations. *Id.* at 490. The Court also held that the Board's refusal-to-bargain finding was not strengthened by the fact that the union's conduct may not have been protected concerted activity, or may not have been time-honored or may deserve public condemnation. *Id.* at 495–496. The Court found no indication "that Congress had put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Id.* at 499–500.

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[96] *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960).

[97] The union's conduct consisted of successive directives pursuant to which its members refused to write new business or to remain at work during customary hours; engaged in picketing and mass demonstration; solicited customers' signatures on petitions; refused to attend business conferences and to make required reports; and engaged in other activities which likewise tended to disrupt and curtail the employers' business.

Although this matter is a troublesome one, I believe the tactic in question here is covered by the broad language of *Insurance Agents'*, therefore, I find it does not support an inference that the UMWA was engaged in bad-faith bargaining.

Based on the foregoing, and the entire record, I find that the UMWA's bargaining stance and conduct, *considered in its totality*, does not establish a case of overall bad-faith bargaining.[98] Accordingly, I shall recommend that this portion of the complaint be dismissed.

In so concluding, I have considered the Charging Party's argument that the other unfair labor practices found herein necessarily demonstrate that the UMWA engaged in a course of overall bad-faith bargaining. While not minimizing the nature and extent of the unfair labor practices found herein, I am not persuaded that, considered in the totality of the circumstances, they make out a case of bad-faith bargaining. I have explained, *supra*, why the UMWA's impermissible conduct connected with the contract proposals containing nonmandatory and illegal provisions does not support an inference that the UMWA engaged in overall bad-faith bargaining. The failure of the UMWA to comply with the Section 8(d)(3) notice requirements is not sufficiently related to the bargaining process itself or to the UMWA's state of mind so as to cast even the slightest doubt about its negotiating conduct. And, although the other illegal conduct which took place prior to the start of the negotiations has made me consider carefully the UMWA's bargaining table conduct, I am convinced that, in the circumstances of this case, this misconduct is insufficient either by itself or coupled with the UMWA's other conduct, both at and away from the bargaining table, so as to taint the UMWA's subsequent entire course of bargaining.

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[98] I have considered the cases relied upon by the General Counsel and the Charging Party, including *N.L.R.B.* v. *General Electric Company*, 418 F.2d 736 (C.A. 2), and am of the opinion they are factually distinguishable in significant respects.

c. *Amax's alleged failure to bargain in good faith*

Amax's bargaining conduct up through the UMWA contract proposal of July 1, 1975, contains very few of the elements customarily associated with bad-faith bargaining. Amax was the one that took the initiative in pressing for negotiating meetings in the face of the UMWA's unlawful refusal to meet and negotiate. After negotiations started on February 3, 1975, Amax during the period ending with its contract proposal of March 14, 1975, made a number of bargaining concessions. In sharp contrast, the UMWA, with the negotiation of the Western Agreement, indicated in effect it would accept nothing less than a contract identical to the Western Agreement.

The UMWA argues that during the negotiating period ending July 1, 1975, Amax's bad faith was manifested by the following conduct: (1) "Patently unreasonable proposals"; (2) proposals which deleted or significantly modified provisions included in the parties' old collective-bargaining agreement; and (3) Amax's package proposal of March 14, 1975, was offered under circumstances which indicate it was calculated to foreclose future negotiations.

Regarding (1), this is definitely not a situation where an employer has formulated and insisted on contract terms which it "must have known had not the slightest chance of being accepted by a self-respecting union." *N.L.R.B.* v. *Reed Prince Mfg. Co.*, 205 F.2d 131, 139–140 (C.A. 1). A review of the provisions included in Amax's several contract proposals does not support this contention. I recognize the UMWA sincerely believed that some of the Company's proposals would, if accepted, prove disastrous to the UMWA and the employees it represented but, judged objectively, the separate provisions of Amax's several proposals, together or separately, cannot be characterized as "patently unreasonable." Moreover, there is no indication, other than in connection with the proposed express no-strike clause, discussed *infra*, that Amax was insisting it absolutely needed the so-called "patently unreasonable" provisions in a contract. There is no evidence Amax's position on these provisions was not negotiable.

Regarding (2), I attribute no particular significance to the fact that several of the provisions included in the Company's contract proposal represent a departure from the corresponding provisions in the old collective-bargaining agreement covering the Belle Ayr Mine which, if accepted, would constitute taking a step backward for the UMWA. In order to understand the Company's motivation in this regard, it is necessary to appreciate the fact that the Belle Ayr Mine only opened for production in 1972, and it is Amax's only mine in the western part of the country. When the mine started to operate in 1972, the National Bituminous Coal Wage Agreement of 1971 was already negotiated and covered Amax's several midwestern mines so, without any negotiation, Amax accepted the terms embodied in this agreement—except for the contributions paid into the health and retirement program which differ for western mines—for the Belle Ayr Mine. But, inasmuch as its midwestern mines are bituminous below the surface mines, whereas the Belle Ayr Mine is an open surface sub-bituminous and lignite mine, whose production capacity is substantially greater than any of the midwestern mines, Amax decided to negotiate a new contract for the Belle Ayr Mine which would modify the old agreement in a number of respects. As a matter of fact, the UMWA, itself, recognized that some of the provisions of the old agreement were not siutable for the Belle Ayr Mine and requested changes in the terms of the old contract. I recognize that a number of departures from the old contract proposed by the Company (i.e., elimination of dues check-off, significant modification of the seniority provisions and a new health and retirement program) were calculated to lead to strong UMWA opposition inasmuch as no union appreciates being asked to give up something already secured through past negotiation. Nonetheless, I am convinced that the Company, by proposing that the recently expired contract be substantially modified was not motivated by any desire to obstruct agreement, rather, for the legitimate reasons described *supra*, it believed it was essential that it negotiate an agreement for its western mine that differed from the one covering its midwestern mines.

Reagrding (3), the Company on Friday, March 14, 1975, without warning submitted a "final" contract offer which made numerous and significant concessions. Amax told the UMWA that this offer was a package which the UMWA had until Monday, March 17, to accept or reject and, if it was rejected, its terms would be implemented and the Belle Ayr Mine reopened.[99] The UMWA urges that the abruptness of this offer and the lack of time the UMWA was given to study and consider it supports an inference that Amax was not bargaining in good faith. I do not agree. As I have found at footnote 28, *supra*, virtually each provision included in the March 14 package had previously been considered by the UMWA. In addition, there is insufficient evidence that, if a request for more time had been made on March 14, Amax would have refused to grant the UMWA additional time to consider the contract proposal. I realize that on Monday, March 17, Payne refused Edelman's request for more time to consider the proposal but, under the circumstances, this refusal was not unreasonable. Edelman gave Payne no indication that the UMWA was favorably disposed toward the offer but, quite the opposite, on Friday, March 14, during their discussion about the offer, Edelman indicated to Payne that the package was unacceptable to the UMWA because it lacked the UMWA's health and retirement program and an expiration date in common with the Western Agreement. Also, the subsequent course of the negotiations indicates that at this stage of the bargaining the UMWA did not have any resonable expectation of accepting the Company's March 14 offer. Thus, the UMWA did not waiver from its demand that Amax agree to the terms of the Western Agreement until the Edelman-Sonnemann meeting of June 16, 1975, which resulted in the UMWA's July 1, 1975 contract proposal.[100] These circumstances—the

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[99] The mine had been shut since the start of the strike, January 12, 1975.

[100] In so concluding, I have considered that the UMWA did indicate it was willing to diverge from the terms of the Western Agreement by entering into a memorandum of understanding which would (1) clarify the intent of certain provisions and (2) modify the agreement's terms in

UMWA's uncompromising insistence before and after the March 14 contract offer that Amax accept the Western Agreement, its indication on March 14 that Amax's offer was not acceptable—coupled with the UMWA's failure to accept the proposal, convince me that on March 17, 1975, a bargaining impasse existed, thus allowing Amax to implement the terms of the March 14 contract proposal.

In concluding that Amax's handling of its March 14 contract proposal is not indicative of bad-faith bargaining and its implementation of the proposal did not constitute illegal unilateral conduct, I have considered the UMWA's further argument that it was not given an opportunity to intelligently consider the retirement program included in Amax's March 14 offer inasmuch as it was not furnished the program's trust documents. I reject this contention, for, as explained to Edelman on March 14 and by Amax's lawyer, Gruender, the reason that no trust documents were included with the proposal was that none existed because it was too impractical and expensive to prepare such documents in advance of the UMWA's agreement, in principle, that the retirement program incorporated in the proposal was acceptable. This does not mean the UMWA was being forced to accept something sight unseen, for I am convinced that the provisions pertaining to the retirement program incorporated in the March 14 proposal were sufficient to enable the UMWA, as proposed by Gruender, to conclude whether it could accept the retirement program *on principle*. In any event, the record demonstrates that Amax's failure to furnish the UMWA with the trust documents for its proposed retirement program had absolutely no bearing upon the UMWA's bargaining position. Thus, when the March 14 offer was first proposed, Edel-

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those instances where Amax was able to demonstrate that the peculiar nature of its operation necessitated deviations, and that on March 7, Payne and Edelman discussed the content of such a memorandum. Nonetheless, I am convinced that, viewed realistically, the UMWA, until it changed its bargaining position at the June 16 Sonnemann-Edelman meeting and its July 1 contract proposal, for all practical purposes was demanding that Amax accept the terms contained in the Western Agreement.

man informed Amax's representatives that the UMWA would not accept a contract which did not include the UMWA's health and retirement program, which statement was reiterated by Yablonski to Amax's negotiators at the meeting of May 28, 1975.

Following the Company's March 14 offer, and its implementation, negotiations remained deadlocked until July 1, 1975, as neither party budged from their respective positions.

In sum, the evidence shows that the Company, during the portion of the bargaining ending July 1, 1975, made every effort to reach agreement. It presented comprehensive counterproposals and made numerous concessions. The stumbling block to agreement was not bad faith on the Company's part, but rather its firm opposition to the UMWA's unyielding demand that it accept the terms of the Western Agreement.

Likewise, the record does not establish Amax was guilty of bad-faith bargaining during the remainder of the negotiations. The UMWA, as found *supra*, in June 1975 indicated to Amax it was prepared to offer concessions to break the bargaining deadlock and, on July 1, 1975, offered a new contract proposal which offered concessions and deviated from the Western Agreement. In the subsequent negotiating meetings, Amax agreed to only two of the disputed matters contained in the July 1 offer. Thereafter, in August 1975, as found *supra*, the bargaining once again reached the point of impasse and the UMWA broke off negotiations. Upon the resumption of negotiations, in October 1975, the UMWA indicated to Amax it was prepared to make further concessions to break the deadlock and, on November 14, 1975, offered a new contract proposal with additional concessions. In return, Amax failed to offer significant concessions. To the contrary, during October, November and December 1975, Amax withdrew one provision which the parties had tentatively agreed to in earlier bargaining;[101] injected into the bargaining for

[101] A vacation schedule proposal.

the first time proposals which it knew the UMWA would view with distaste;[102] and either withdrew or modified proposals after the UMWA had indicated their acceptance.[103]

The ultimate stiffening of Amax's approach to bargaining, as set forth above, is not evidence that Amax was bargaining in bad faith. Rather, the record indicates that this change in company tactic was caused by the UMWA's ineffectual strike, which both exposed the UMWA's inability to exert economic pressure and weakened its bargaining power. Understandably then, the Company after it resumed operations made comparatively few concessions and elected to stand essentially on its March 14, 1975 offer and, as the months passed, withdrew certain proposals and interjected new proposals which it believed were to its advantage. In this regard, I think the language of the Court in *N.L.R.B.* v. *Alva Allen Industries, Inc.*, 369 F.2d 310, 318 (C.A. 8), is particularly appropriate:

> In the present case it was apparent to all parties that the Union had lost the economic strike and its position had so deteriorated that it no longer had the strength to deal with the Company on a competitive basis. In such a situation it is only natural that the Company sensing its strong position, will bargain with increasing toughness and will be less inclined to make concessions to the Union. The company had a right to withdraw its proposals of the prior summer and had a right to reject propositions which it felt inimical to its best interests . . . .

See, also, *Caroline Farms Division of Textron, Inc.* v. *N.L.R.B.*, 401 F.2d 205, 211 (C.A. 4); *Warehousemen & Mail Order Employees Local No. 743* v. *N.L.R.B.*, 302 F.2d 865, 868 (C.A.D.C.). Moreover, of the several con-

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[102] An express no-strike clause as well as a provision that an employee's first five absences during a year be charged to personal or sick leave.

[103] Loading and processing of previously mined and stockpiled coal to fill out unit trains; construction clause; regular overtime for military duty and birthday holiday leave; and the sharing of idle day work, overtime and premium time.

tract provisions that Amax either modified or withdrew, the record fails to indicate that any one of them involved an item which the parties viewed as particularly significant. And, regarding the two new matters which the Company injected into the negotiations, only one, the demand for an explicit no-strike clause, is of significance. Under the circumstances, I cannot conclude that the Company, in modifying its March 14 contract proposal so as to make it less favorable to the UMWA, was motivated by a desire to obstruct agreement or that it otherwise indicates that the Company was negotiating without a sincere desire to reach agreement.

Based on the foregoing, and the whole record, I find that the evidence in its totality fails to establish that Amax engaged in overall bad-faith bargaining.

8. The responsibility of Local 1854 for the unfair labor practices committed by the UMWA

Respondent Local 1854 is the certified bargaining representative of the employees involved in the instant dispute. The Act requires that the UMWA bargain as an agent on behalf of Local 1854 whereas, here, Amax insisted that Local 1854 be a party to any collective-bargaining agreement. *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Also, the UMWA in its November 14, 1975 contract proposal acknowledged that it was negotiating "on behalf of Local 1854." Also, Local 1854 participated in the unfair labor practices found herein by striking in support of the UMWA's bargaining position and would have received the fruits from the contract negotiations and the illegal activities engaged in by the UMWA. Under these circumstances, whether the UMWA is viewed as acting as Local 1854's agent or whether the UMWA and Local 1854 are viewed as having engaged in a common enterprise, I find that Local 1854 is jointly responsible for the illegal activities found herein.

The Remedy

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Amax Coal Company, a Division of Amax, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America, Local No. 1854, and United Mine Workers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. United Mine Workers of America, Local No. 1854, has been at all times material herein, and is, the exclusive representative of the employees in the aforesaid unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

5. By engaging in a strike for the purpose of forcing Amax to enter into a collective-bargaining agreement containing clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

6. By engaging in a strike and picketing with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

7. By insisting to the point of impasse that Amax accept contract clauses prohibited by Section 8(3) of the Act, Respondents have engaged in unfair labor

practices within the meaning of Section 8(b)(3) of the Act.

8. By insisting to the point of impasse that Amax accept contract clauses requiring Amax to bargain with Respondents about the wages and other working conditions of Amax's employees in bargaining units other than the Belle Ayr Mine, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

9. By failing to give notice of the existence of a dispute between it and Amax to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without restoring to a strike all the terms and conditions of an existing contract pursuant to 8(d)(4) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

10. By failing and refusing to meet and bargain collectively with Amax between December 18, 1974 and February 3, 1975, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

11. By threatening to strike Amax if it did not select another employer as its representative for the purposes of collective bargaining, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondents have not otherwise violated the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[104]

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[104] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as pro-

ORDER

Respondents, United Mine Workers of America, Local No. 1854, and United Mine Workers of America, their officers, agents, and representatives shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between it and the Company, involving the bargaining unit described hereinabove, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act.

(b) Engaging in, calling or causing the employees in the appropriate unit described hereinabove to engage in a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

(c) Restraining or coercing the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(d) Refusing to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(e) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept contract clauses prohibited by Section 8(e) of the Act and by insisting to the point of impasse that Amax Coal Company accept contract clauses requiring it to bargain about the wages and other working conditions of employees in bargaining units other than the unit described hereinabove.

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vided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(f) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of provisions prohibited by Section 8(e) of the Act in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

(g) Inducing or encouraging any individual employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, or threatening, coercing or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where in either case an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement prohibited by Section 8(e) of the Act.

2. Take the following affirmative action designated to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."[105] Copies of said notice, on forms to be provided by the Regional Director for Region 27, shall, after being duly signed by representatives of Respondents, be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

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[105] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for forwarding to Amax Coal Company for information and, if it is willing, for posting it in all locations where notices to its employees in the unit described hereinabove are customarily posted.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated amended complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated: March 22, 1977

/s/ _____

JERROLD H. SHAPIRO
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively with AMAX COAL COMPANY on behalf of its production and maintenance employees in the Belle Ayr Mine by engaging in, calling or causing the employees to engage in a strike, for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act; by failing and refusing to meet with the Company for the purpose of negotiating a collective-bargaining agreement; by insisting to the point of impasse that the Company accept contract provisions prohibited by Section 8(e) of the Act; by insisting to the point of impasse that the Company accept contract provisions requiring it to bargain about wages and other working conditions for employees employed by the Company in bargaining units other than the Belle Ayr Mine; and by striking the Company for the purpose of forcing it to accept a collective-bargaining agreement containing provisions prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce the AMAX COAL COMPANY in the selection of its representatives for the purpose of negotiating a contract covering the production and maintenance employees employed at its Belle Ayr Mine.

WE WILL NOT induce or encourage employees of AMAX COAL COMPANY's Bell Ayr Mine to refuse to perform services in the course of their employment or threaten, coerce or restrain by picketing or other means AMAX COAL COMPANY, where an object thereof is forcing or requiring AMAX COAL COMPANY to enter

into an agreement which is prohibited by Section 8(e) of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854 AND UNITED MINE
WORKERS OF AMERICA
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Sections 8(b), (d) and (e) of the National Labor Relations Act, 29 U.S.C. 158(b), (d) and (e), provide in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing

or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, de-

liver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in

this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. 186, provides:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other things of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor ve-

hicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employ-

ees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions or retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*,

That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and pos-

sessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Sections 401 through 409 of the Employees Retirement Income Security Act of 1974, 29 U.S.C. 1101-1109, provide:

§ 1101. (a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than—

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

§ 1102. (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter.

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedures described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

§ 1103. (a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this subchapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c)(1) of title 26; or

(ii) which consists of one or more individual retirement accounts described in section 408 of title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of title 26.

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to

the employer within one year after the payment of the contribution.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of title 26, and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contributions to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of title 26) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

(d)(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

§ 1104. (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

§ 1105. (a) In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowedge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or ommissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under this paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustees shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. (a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account.

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a

party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

§ 1107. (a) Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(a) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b)(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2) Cross references.—

(A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 1104(a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

(c)(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of—

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) of the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) For purposes of this section—

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A con-

tract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(4) The term "qualifying employer real property" means parcels of employer real property—

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in section (e) of this section).

(6) The term "employee stock ownership plan" means an individual account plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase both of which are qualified, under section 401 of title 26, and which is designed to invest primarily in qualifying employee securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

(e) For purposes of subsection (d)(5) of this section, the term "marketable obligation, means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if—

(1) such obligation is acquired—

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation—

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the

plan is invested in obligations of the employer or an affiliate of the employer.

§ 1108. (a) The Secretary shall establish an exemption procedure for purposes of this subsection, pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interest of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders

able to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity consideration written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excess or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secre-

tary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making of a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(c) Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries:

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reim-

bursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Section 1107(b) of this title and subsections (a), (b), (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly—

(1) lends any part of the corpus or income of the plan to;

(2) pays any compensation for personal services rendered to the plan to; or

(3) acquires for the plan any property from or sells any property to;

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of title 26), a member of the family (as defined in section 267(c)(4) of title 26) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of the subsection a shareholder employee (as defined in section 1379 of title 26) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of title 26) and an employer or association of employers which establishes such an account or annuity under section 408(c) of title 26 shall be deemed to be an owner-employee.

(e) Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan for qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a market-

in an amount greater than the amount made available obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

§ 1109. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

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